EDITOR'S NOTE

ORIGINAL PAGINATION NOT CONTINUOUS

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002

BEVERLY B. MANN,

Petitioner,

v.

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Beverly B. Mann
Petitioner *Pro Se*
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QUESTIONS PRESENTED

1. Did the Court of Appeals err in interpreting this Court's holding in *BE&K Construction Co. v. NLRB*, 122 S. Ct. 2390 [2002), as extending the First Amendment protections delineated in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, only to fee-shifting sanctions imposed by regulatory agencies and not to fee-shifting sanctions imposed by Article III courts [in the instance pertinent here, a fee-shifting sanction citing 28 U.S.C. § 1927, imposed *sua sponte* and *ex parte* by the federal appeals court that issued the holding which this petition seeks review)? Stated otherwise, does the First Amendment's "right to petition" clause bar the imposition of (and the loose implicit possibility of the imposition of) a fee-shifting sanction by an Article III court for the filing of an objectively *non*baseless lawsuit that, unlike the one in *PREI*, is not an antitrust action, and if so does the "right to petition" clause preclude such sanction absent a threshold due process inquiry into *whether* the lawsuit at issue indeed is objectively baseless?

2. Did the Court of Appeals err in defining as an executable "judgment" (with the legal implications attendant to judgments) a fee-shifting sanction issued *sua sponte* and *ex parte* by a federal appeals court, notwithstanding that the imposition of the sanction resolved no dispute whatsoever between the litigants and that it was imposed for separate litigation never pending in that court, in which the designated recipient of the sanction fee was not a party, and that the conduct sanctioned was alleged and found wrongful only by the sanctioning court absent any procedural due process (literally, a process conducted entirely in absentia)? The legal implications at issue here are: (1) the disbarment by that court of the attorney sanctioned, in the face of her refusal to pay the sanction; and (2) the attempt by the beneficiary of the sanction order (Cook County, Illinois) to execute that sanction order as a monetary judgment in a state-court execution-of-judgment proceeding.

3. May a sanctions order issued by an appellate court *sua sponte* and *ex parte*, imposed for alleged conduct in separate litigation never pending in that court, be challenged collaterally as void – as in *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957), in a non-sanctions context – for lack of personal jurisdiction by that court over the litigant or the attorney sanctioned, irrespective that the sanctions order was issued under the caption of a case that *was* before that court? Phrased otherwise, does the collateral-bar rule cited in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), upon which the Court of Appeals relies, apply even when, unlike in *Spangler*, the order was entered not in resolution of issues that were orderly litigated (or litigated at all) but instead *sua sponte* and *ex parte*, and when, also unlike in *Spangler* (which concerned a continuing injunction), there is *no mechanism* by which the *ex parte* order can later be challenged?

4. Did the Court of Appeals err in holding that the right to petition an appellate court for discretionary reconsideration of a judgment or permanent order issued by that court *sua sponte* and *ex parte*, coupled with the right to petition this Court for writ of certiorari, *alone* satisfies the Fifth Amendment's procedural due process guarantee, irrespective that unlike temporary restraining orders or preliminary injunctions, the *ex parte* order is permanent, and irrespective that there existed no emergency that compelled that the ruling be made *ex parte*?

5. Did the Court of Appeals err in holding that Federal Rule of Appellate Procedure 46(b)(1)(B), which that court itself describes in its opinion as establishing "an open-ended standard of lawyers' deportment rather than a list of disciplinary rules, as all states and many district courts have done," is not unconstitutionally vague, either generally or as applied to the petitioner?

6. Does an order barring (perhaps permanently) an individual from access to all federal courts within the

federal circuit in which she resides – including a bar even to the filing of a petition to vacate that very order in light of new authority of this Court, and including (in this instance) a bar to the filing of a motion to that court requesting clarification of whether it retained jurisdiction over the sanction order described above (thus eliminating state-court jurisdiction in an execution-of-judgment suit) – violate the First Amendment's right-to-petition clause as interpreted in *BE&K Construction Co. v. NLRB*, and the First Amendment's free speech clause?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Seventh Circuit were as follows:

Appellant: Beverly B. Mann

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Illinois Supreme Court Rule 381(a)

CONSTITUTIONAL, STATUTORY AND PROCEDURAL-RULE PROVISIONS AT ISSUE

1. United States Constitution, Article III, Section 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

2. United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

3. United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5. Counsel's Liability for Excessive Costs, 28 U.S.C. § 1927:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

6. State and Territorial Statutes and Judicial Proceedings; Full Faith and Credit, 28 U.S.C. § 1738:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be Authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

7. Tax Injunction Act, Taxes by States, 28 U.S.C. § 1341:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

8. Federal Rule of Appellate Procedure 46(b)(1)(B)

Federal Rule of Appellate Procedure 46:

RULE 46. Attorneys

(b) Suspension or Disbarment.

(1) *Standard.* A member of the court's bar is subject to suspension or disbarment by the court if the member:

(B) is guilty of conduct unbecoming a member of the court's bar.

9. Federal Rule of Civil Procedure 65(a)(1) and (b)(1)

(a) PRELIMINARY INJUNCTION.

(1) *Notice*. No preliminary injunction shall be issued without notice to the adverse party....
(b) TEMPORARY RESTRAINING ORDER; NOTICE; HEARING; DURATION.
A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if
(1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary

restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

10. Reversal or Dismissal, 735 ILCS § 5/13-217:

In the actions specified in Article XIII of this Act or any other act or contract where the time for commencing an action is limited, if judgment is entered for the plaintiff but reversed on appeal, or if there is a verdict in favor of the plaintiff and, upon a motion in arrest of judgment, the judgment is entered against the plaintiff, or the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction, or the action is dismissed by a United States District Court for improper venue, then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff, his or her heirs, executors or administrators may commence a new action within one year or within the remaining period of limitation, whichever is greater, after such judgment is reversed or entered against the plaintiff, or after the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction, or the action is dismissed by a United States District Court for improper venue.

11. Fees-Counties of 3,000,000 or More, 705 ILCS §105/27.2a(k):

§ 27.2a. The fees of the clerks of the circuit court in all counties having a population of 3,000,000 or more inhabitants in the instances described in this Section shall be as provided

in this Section. The fees shall be paid in advance and shall be as follows:

(k) Certification, Authentication, and Reproduction.

(2) Court appeals when original documents are forwarded, under 100 pages, plus delivery and costs; $75.
(3) Court appeals when original documents are forwarded, over 100 pages, plus delivery and costs, $150.
(4) Court appeals when original documents are forwarded, over 200 pages, an additional fee of 25 cents per page.

12. Contents of the Record on Appeal, Illinois Supreme Court Rule 321:

The record on appeal shall consist of the judgment appealed from, the notice of appeal, and the entire original common law record, unless the parties stipulate for, or the trial court, after notice and hearing, or the reviewing court, orders less. The common law record includes every document filed and judgment and order entered in the cause and any documentary exhibits offered and filed by any party. Upon motion the reviewing court may order that other exhibits be included in the record. The record on appeal shall also include any report of proceedings prepared in accordance with Rule 323. There is no distinction between the common law record and the report of proceedings for the purpose of determining what is properly before the reviewing court.

13. Illinois Rule of Profession Responsibility 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for an extension, modification or reversal of existing law. A

lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

CITATION TO PUBLISHED OPINION

This is an attorney disbarment matter initiated on June 18, 2002, by the United States Court of Appeals for the 7th Circuit. (Apps. C and D.) That court on November 1, 2002, issued an opinion in *In the matter of: BEVERLY B. MANN, Respondent*, 311 F.3d 788, 2002 U.S. App. LEXIS 27408, the final sentence which reads: "Beverly Mann is removed from the roll of attorneys authorized to practice in this court." (App. A.) Petitioner timely filed a petition for rehearing, which was denied on November 26, 2002. (App. B.) She submitted a petition for writ of certiorari to this Court postmarked February 24. This Court returned 39 of the copies of the petition, accompanied by a deficiency letter dated March 6 advising her that pursuant to this Court's Rule 14.5 she could submit a petition that complies with Rule 33. (App. A(a) .)

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE[1]

A. Background

This case has been to this Court before, during the 2001-02 term, in an incarnation known then as *Beverly B. Mann v. Dorothy Brown*, as Clerk of the Circuit Court of Cook County, Illinois, and Cook County, Illinois, 2001 U.S. App. LEXIS 19829 (7th Cir. 2001), Nos. 99-1750 & 99-3595, cert. denied, 534 U.S. 1131 (2002), No. 01-856. That lawsuit challenged as violative of the Fourteenth Amendment's equal protection and

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[1] Uncomfortable with the disorienting artifice of referring to herself in the third person, the *pro se* petitioner uses a first-person construction in the remainder of this petition.

due process clauses a subsection of an Illinois statute, 705 ILCS § 105/27.2a(k)(4), that establishes a ceilingless court-clerk's fee of $.25 per page for the preparation of court records for appeal. The fee applies irrespective of the size of the court record or the number of lengthy exhibits (such as deposition transcripts) that appear redundantly in it, and irrespective of the proportion of the record that is relevant to the rulings on appeal. It can total several thousand dollars.

An Illinois Supreme Court Rule, Rule 321, requires that the entire court record be prepared and transferred to the appellate court unless a court order is obtained permitting the severance of the relevant portions of the record from the remainder of it. The fee is paid to the county court clerk's office, which transfers the money into the county's general revenue fund—the fund that pays for the operation of the county government in its various functions, including its prisons, its public hospital and medical clinics, its road maintenance, and its forest preserves. The fund does not, however, pay for the operation of the courts. Because the respective counties' courts throughout Illinois are part of the state court system, the county's general fund pays nothing toward the maintenance of the court systems other than for the cost of running the court clerk's office; Illinois' Constitution provides that the state rather than the county fund the courts.

I am a nonpracticing attorney and was the plaintiff in a pharmaceutical products liability lawsuit litigated in Illinois state court, a case called *Beverly Mann v. The Upjohn Company*, 324 Ill. App. 3d 367 (2001), cert. denied, 122 S. Ct. 2358 (2002), from which *Mann v. Brown* stemmed. In September 1998, my products liability lawsuit was newly pending on cross-appeals in the Illinois Appellate Court, First District. As the appellant-and cross-appellee, I was required to have the court record prepared for appeal and to pay the record-preparation fee, which totaled $1,654.00. I presumed that this fee represented many times the cost to the county of the service for which the fee was being charged, and verified the accuracy of my presumption by obtaining a copy of the collective bargaining agreement that showed the approximate

number of employees of the Cook County Circuit Court Clerk's Office, their hourly rate of pay and the employee benefits they were receiving. I calculated that the per-page fee amounted to several hundred times the actual cost to the county of providing the service.

Illinois Supreme Court Rule 321 permits, upon agreement of the parties or at the judge's discretion, the severance of the portion of the court file pertinent to the issues to be addressed on appeal (in my case, a few hundred pages) so that only that portion will become part of the appellate record and thus will be billed at the per-page rate. I presented a motion under that Rule to the state-court trial-court judge who had last presided in the products-liability. My motion sought, alternatively, a ruling that § 105/27.2a(k)(4) violates the 14th Amendment and a corresponding provision of the Illinois Constitution.

The products-liability defendant objected to Rule 321 document severance, arguing that its appellate counsel would need to review the entire record. The judge denied the motion for document severance, saying that she lacked the authority to grant such a motion, and without argument on the merits of the constitutional challenge declined to exercise jurisdiction over that portion of my motion, saying that the issues it presented were too remote from those in the products-liability case and that in any event there was not an identity of parties or parties-in-interest in the two matters, a requirement for joinder of issues under Illinois law. "File another lawsuit," the judge told me.

As the moving party, I handwrote the order (as is customary in that court), and wrote simply that the motion was denied, a partially imprecise statement although by it I meant that the judge had denied the portion of my motion brought under Rule 321 and had denied my motion to hear the challenge to the constitutionality of § 105/27.2a(k)(4). No court reporter was present at the hearing, but because my motion sought alternatively to challenge the constitutionality of § 105/27.2a(k)(4), I had delivered notice and a copy of my motion to the Office of the Cook County State's Attorney's Civil Division and then phoned that office and requested that

an assistant state's attorney be present at the hearing. The assistant state's attorney who appeared was the one who represented the County throughout the subsequent litigation in federal court—in the district court and on appeal—a fact of significance, as will become apparent below.

I filed another lawsuit as the state-court judge advised, albeit in federal district court. The lawsuit challenged the fee statute as an artificial and potentially steep financial barrier to access to appellate review and as a tax on access to appellate review in violation of the 14th Amendment's equal protection and due process guarantees. It sought, in addition to an ultimate determination of the constitutionality of the fee, a temporary writ of mandamus compelling the Circuit Court Clerk's office to release the already-prepared court record to the appellate court without my prepayment of the remaining fee. (I had paid an initial $75, which was required at the time the record in ordered prepared for appeal.)

At a hearing a few days after I filed the complaint, the district judge dismissed the case. Citing the abstention doctrine under *Younger v. Harris*, 401 U.S. 37 (1971), the judge said I needed to seek a ruling ultimately from the Illinois Supreme Court before I could proceed with the constitutional challenge in federal district court. He also said he thought that, notwithstanding my account of what the state-court judge had said at the hearing—an account that the assistant state's attorney did not dispute, then or ever—the wording of the written, single-sentence state-court order may implicate *Rooker-Feldman* preclusion, a contention I contested. I argued that although the wording of the order was ambiguous, the assistant state's attorney was not contesting my representation of what had transpired at the state-court hearing: that as there had been no argument or discussion at that hearing about the merits of the constitutional claim and that the judge said she was not ruling on the merits but instead was denying my motion to *consider* the merits.

The district judge did not rule on that issue, and instead abstained citing *Younger*. He issued a single-sentence written order saying only that he was dismissing the case for lack of

jurisdiction; he provided no elaboration. I had argued to him that since there was no determination on the merits, there was no preclusion of litigation on the merits—a position that was supported by extensive authority in various federal circuits including the Seventh; in a lengthy concurrence recently, in *ITOFCA, Inc. v. MegaTrans Logistics*, 322 F.3d 928 (Mar. 7, 2003), Judge Kenneth F. Ripple, saying he was writing separately solely to recite settled law on exactly this issue, noted that *res judicata* is determined as a matter of fact based upon the intention of the court that ruled in the earlier matter, and that the party asserting *res judicata* bears the burden of establishing an ambiguously written earlier order *actually* was intended to determine the issue now sought to be precluded, and that due process demands that unresolved ambiguities regarding the intent of the earlier order be resolved *against* preclusion.[2]

I then petitioned, unsuccessfully, for review by the Illinois Supreme Court under Illinois Supreme Court Rule 381, which permits direct petition to that court in certain circumstances, including (explicitly) challenges to the federal or state constitutionality of a state revenue statute. Upon the denial of my petition for review, I presented a motion to the state-court judge who had heard the earlier motion, this motion seeking (in essence) reconsideration of that judge's rulings on the earlier motion. The state-court judge, instead of simply ruling on the motion—which stated simply that the earlier order had denied the earlier motion—said that the earlier order *inaccurately reflected her ruling*. She said she had not *denied* my challenge to the constitutionality of § 105/27.2a(k)(4); she had *declined to hear* my challenge to the

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[2] Citing, e.g, *Kulavic v. Chi. & Illinois Midland Ry. Co.*, 1 F.3d 507, 517 (7th Cir. 1993) (noting that "the burden of establishing preclusion is placed on the party claiming it," *id.* at 517 n.6 (internal quotation marks and citations omitted); also citing *Gleash v. Yuswak*, 308 F.3d 758, 760 (7th Cir. 2002) (noting that claim preclusion is an affirmative defense).

constitutionality of § 105/27.2a(k)(4). She again declined to hear my challenge to the constitutionality of § 105/27.2a(k)(4), saying as she had at the earlier hearing, but this time rather angrily: "File another lawsuit." And this time, she insisted upon dictating the verbatim language of the order so that it would accurately reflect her rulings on *both* motions. That order, dated Nov. 20, 1998, the date of the hearing, read:

> This cause coming on to be heard on plaintiff's Motion for Leave by the Parties to Jointly Remove Most Documents from the Court Record in Order to File Them Independently with the Court of Appeals in Supplement to the Record, or, Alternatively, to Find Unconstitutional Subsection (k) (4) of the Illinois Clerk of Courts Act, 735 ILCS 105/27a (k) (4), it is ordered that:
>
> 1. **The court states that it is reiterating that it is declining to accept jurisdiction to hear the constitutional challenge because the constitutional challenge was not a part of, and is collateral to, the underlying products liability lawsuit.** [My emphasis.]
> 2. The motion to remove documents from the record is denied on the basis that the court lacks the authority to allow it.

The state-court judge thus dictated and signed an order that said in unequivocal language that *her earlier order* was *not* a ruling on the merits of the constitutionality of § 105/27.2a(k)(4). And, significantly for this petition, in doing so she confirmed that *my* earlier account to the federal district judge about what had transpired at the earlier state-court hearing—specifically, that the state-court judge had said at that earlier hearing that she was not ruling on the merits—was dead-on accurate. No court reporter was present at the Nov. 20 hearing, but an assistant Cook County State's Attorney, again upon my written notice and at my oral request, was present and so knew that (as I represented orally and in writing to the district judge and later in my briefs to the federal appellate court) the state-court judge had insisted upon dictating the

verbatim language of the order she signed and entered at the close of that hearing—language whose very purpose was to enunciate that the judge had refused at the earlier hearing to consider (much less to rule on) the merits of my constitutional challenge.

Armed with the superceding (or perhaps just clarifying) Nov. 20, 1998 order of the state-court judge, I filed a motion in federal district court pursuant to Federal Rule of Civil Procedure 60(b) for reinstatement of my federal court lawsuit on the grounds that by respective virtue of my declined petition to the Illinois Supreme Court under Rule 381 and the Nov. 20 state-court order clarifying that there was no ruling on the merits of my constitutional claim, whatever *Younger* or *Rooker-Feldman* obstacles to federal jurisdiction had been removed. The district judge denied the motion, saying that Rule 60(b) relief would be inappropriate because, based upon the wording of the original state-court order and upon my failure before I filed that federal lawsuit to have sought Illinois Supreme Court review, the dismissal of the federal lawsuit was correct at the time it was dismissed.

Thus if I wanted the case heard in federal court, I would have to file a new lawsuit based upon the jurisdictional facts as they existed *then*—just as a plaintiff whose federal diversity-jurisdiction lawsuit was earlier dismissed for lack of complete jurisdiction might be denied Rule 60(b) relief but could refile a still-timely lawsuit in federal district court if, due to changed circumstances, e.g., a slightly altered compilation of parties, diversity indeed exists at the time of the refiling. So I did; I filed another petition for preliminary injunction, and a mandamus complaint challenging the constitutionality of § 105/27.2a(k)(4). The defendants' counsel challenged the refiling, arguing that the district court's jurisdictional dismissal was barred by the doctrine of *res judicata*, an argument premised upon an assertion that jurisdiction was determined as of the date on which I filed my original federal-court complaint rather than as of the date on which I filed the current one. The judge disagreed, ruling that federal jurisdiction was determined as of the date the *current*

lawsuit was filed, a ruling in conformance with this Court's authority as reiterated recently in *Jinks v. Richland County*, 123 S. Ct. ___ (Apr. 22, 2003).

In May 1999, the district judge issued a memorandum opinion denying my petition for preliminary injunction. I filed an appeal, No. 99-1750, pursuant to 28 U.S.C. § 1292(a)(1), which expressly permits appeals from denials of petitions for preliminary injunction. While that appeal was pending, the defendants filed a motion for summary judgment and the district court granted it, issuing a lengthy memorandum opinion holding that § 105/27.2a(k)(4) does not violate the Fourteenth Amendment. I filed an appeal, No. 99-3595, from that as well.

B. The Aug. 31, 2001 Resolution in *Mann v. Brown*

The two appeals in *Mann v. Brown* resulted in three consecutive unpublished orders issued by the Court of Appeals that were the subject of my petition for writ of certiorari in that case. The first of those was a five-page unpublished order issued on August 31, 2001. It is reported at 2001 U.S. App. LEXIS 19829, and was included by the court as Appendix A to the disbarment opinion. That order resolved the appeal based—by the court's own acknowledgment in the order itself—entirely upon affirmative defenses not asserted by the defendants either in the district court or on appeal and in fact not available to the defendants under Illinois law in light of procedural and substantive facts in the case. The order veritably teems with inaccuracies of fact and inaccuracies of Illinois law.

As there was no oral argument in the appeal, my first notice of these affirmative defenses was contained in the order that invoked them as the grounds for the court's ruling.

The affirmative defenses: the abstention doctrine under *Younger* and *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1 (1987), and the Tax Injunction Act, 28 U.S.C. § 1341.

Neither defense, though, was available to the defendants in my case, which may be why they had not asserted them.

Illinois Supreme Court authority, specifically *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, N.E.2d 338 (1998), an opinion that the federal appellate court apparently was unaware of but that I was well aware of—it played a role in my underlying products-liability lawsuit and in fact was cited in the appellate opinion in that lawsuit—flatly bars appeals from denials of joinder motion. *Vaughan Oil* says that because it (normally) is far quicker and cheaper to simply file the claim as a separate lawsuit, and because of the likelihood of affirmance on appeal from the denial of joinder in any event, given the deference accorded to the trial judge on such motions, the better course is to file the claim as a separate lawsuit, and so the court eliminated the availability of appeal as an alternative.

Nor, had I had the option to appeal and had I appealed, would I have won. The Illinois Supreme Court, in *River Park, Inc. v. Highland Park*, 184 Ill. 2d 290 (Nov. 19, 1998), formally adopted the "same transaction" test for joinder of claims, and the lower Illinois courts were using that test long before that. Had I appealed from the denial of my joinder motion through the state hierarchy, as the federal appellate court said was my only (long, winding) route to access to eventual court determination on the merits of my claim, I would have found myself on a treadmill. And Illinois had *never required* an appeal as an exhaustion prerequisite to the filing of such a claim as a separate action.

The court was just as profusely inaccurate regarding Illinois law in relation to the Tax Injunction Act, writing that if the charge is a tax "then § 1341 bars any federal interference if a plain and speedy remedy is available in state court. Supreme Court Rule 298 offers one such remedy; asking the state's court of appeals for relief from the charge is another. Mann pursued neither." And with good reason. The remedy that Illinois Supreme Court Rule 298 provides, commonly known as a pauper's petition, was unavailable to me, and Illinois law provides no mechanism by which the courts of appeals can relieve an appellant from the charge. Nor can a federal statute, § 1341 or any other, eliminate the right

to challenge the constitutionality of a statute; it is the Constitution, not 28 U.S.C. § 1983, that creates the constitutional right to challenge the constitutionality of a statute, and § 1341 does not supercede that right. Nor was that the objective of § 1341; the plain-and-speedy-remedy reference is to a plain and speedy mechanism for challenging a statute's constitutionality. Illinois Supreme Court Rule 381 is such a provision, which is why I invoked it. To the extent, if any, that the Tax Injunction Act actually applied in my case, I already had satisfied its mandate by filing my two joinder motions and my Rule 381 petition to the Illinois Supreme Court.

But the court did not mention 28 U.S.C. § 1738, either explicitly or by inference; it did not inquire into the preclusive effect of the state-court order under Illinois law. The court in fact did not even *mention* Illinois law.

It vacated the district court's ruling on the merits and remanded the case to that court with instructions to abstain. But it did not stop with merely invoking *Younger* and *Pennzoil* and the Tax Injunction Act and remanding the case for dismissal on those abstention grounds. Without actually ruling on anything that would have preclusive effect, it tried to effectively bar me from litigating it in state court. The court stated without coherent identity of the basis for it that the case could have been dismissed on *res judicata* grounds, but said that since the defendants had not asserted *res judicata* and instead had argued the appeal only on the merits the court would not decide the case on that basis. The order reads like a Rorschach test; each time I read it, it seems to be basing its *res judicata* advisory conclusion on something other than what I earlier had thought. The court makes wildly baseless statements of fact, such as that the state-court judge determined the merits of the constitutional challenge, and that the district judge concluded—accurately, no less—that I had lied to him about what had transpired at the initial state-court hearing.

And while declining to decide the case on the merits, the court nonetheless opined about them. It pronounced the lawsuit "absurd," an appellation explained by imprecise

derision and this: "[M]uch of Mann's substantive argument is sunk. So far as the federal Constitution is concerned, it makes no difference whether fees go into the state (or county) treasury, which then underwrites the judicial system, or instead are deposited into a separate fund under the control of the courts."

The court was right; it does make no difference. But that's irrelevant because the court's premise of *fact* was patently erroneous. The government that receives the file-preparation fees is *not the same government* that funds the court system. Under the Illinois Constitution's "home rule" provision, taxes and fees collected by the counties, even the fees mandated by state statute, are not passed on to the state. And under another provision of the state Constitution, it is the state rather than the counties that underwrites *in full* the state's court system at all three levels. So while the fee is not a net money-raiser for the state, *is* a net money-maker—a very substantial one, in fact—for the county, given that the county pays *nothing* toward the expenses of running the judicial system other than that it funds the court *clerk's* office. That was the central fact upon which I based my lawsuit, and it permeated my briefs to that court. The appellate court apparently did not know that.

C. The Sanction Order

The Aug. 31 order also pronounced the case "absurdly protracted," a conclusion the court reached by simply tallying the number of initial pleadings I had filed dating back to my complaint in the products-liability lawsuit (a designation that presumably also would apply to legal malpractice lawsuits that allege malpractice in lengthy earlier litigation). Included in the tally were my two state-court joinder motions, the Illinois Supreme Court Rule 381 petition whose purpose was to remove *Younger* comity concerns, my Rule 60(b) motion on my original federal-court petition, and various filings (in addition to the original complaint) in the products-liability case, including my refiling of that lawsuit in state court

pursuant to Illinois statute, that were not even conceivably related to the issue of the constitutionality of §105/27.2a(k)(4) and about which the federal appellate court knew nothing. And of course, primary among the items were my respective appeals from the denial of my petition for temporary injunction and the summary judgment on the merits of my constitutional claim.

The court provided no summary of the facts nor of the nature of the legal grounds I had asserted in the tallied pleadings in any of the cases that were not before that court; it noted only the ultimate instance-specific relief I had sought, a tactic no more justified in those instances than, say, a summary of a habeas petition that says only that the petitioner wants to get out of jail, or a summary of a contract or a personal injury or securities fraud case that says only that the plaintiff wants to be awarded some money.

Stating a belief that under Illinois law I could litigate the matter in state court as long as, but *only* as long as, the underlying products-liability case remained pending on appeal—an incorrect assumption, and one that I don not even understand—and fearing that I would refile it in state court, the court waited fully *eighteen months* after completion of the briefing before submitting the case for decision on August 15, 2001, *one day after* the state appellate court denied my rehearing petition. Then it said although it was not deciding the appeal on the merits, I nonetheless would be unable to litigate the matter in state court because, it claimed, I had waited to file the federal-court action until the state-court appeal in the products-liability case was resolved—suggesting a sonic-speed federal litigation process that took no more than 16 days from the date of filing of the complaint to the date of resolution of the appeal.[3] The order then said:

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[3] "[T]he fact that the appeal in the state case has concluded does not lift the abstention doctrine; one may not avoid a state forum by waiting until its process has concluded. See *Nelson v. Murphy*, 44 F.3d 497 (7th Cir. 1995)."

> These proceedings not only imposed on the federal courts (and the defendants) but also appear to come within the scope of 28 U.S.C. § 1927 ... Mann, an attorney, has multiplied these proceedings unreasonably and, in an objective sense, vexatiously."

Without explanation for why it believed it had jurisdiction over the products-liability lawsuit and over the initial federal petition I had filed challenging § 105/27.2a(k)(4), which I had not appealed, or for that matter over *me* in any matter whatsoever other than the one on appeal there, recited a litany of grievances I did not know it had against me dating back to my filing of the products-liability lawsuit.

Nearly every representation of fact in the litany is verifiably false, some deliberately so, others not. The statements about what transpired in the products liability case were taken loosely from the state appellate court's opinion in the products liability lawsuit. That opinion contained a cascade of outright falsehoods; I had won key trial-court motions that that opinion said I had lost, I was never sanctioned by the trial court (much less barred, as a sanction, from presenting certain evidence), I had had numerous sets of interrogatories and requests for admission stricken and had answered all discovery demands that were not stricken, etc., etc., etc. Nor, as the federal appellate court alleged elsewhere in the Aug. 31 order, did I dismiss the case in federal court in 1992 in order to avoid submitting to discovery; I dismissed it —or more accurately, my attorney at the time dismissed it, before any but a single discovery demand had been made—in order to add as a defendant my diversity-destroying treating physician (whom I had not wanted to sue) and thus return the case to state court, where my attorney and I wanted it litigated and where it was pending before the defendant removed it. Nor had my opponent in that litigation asserted otherwise.

As for why the Illinois Appellate Court so misrepresented the record in the products liability case and addressed inexplicably-fabricated facts that, even if accurate, could not plausibly have been at issue in that appeal, the bottom line is

that it needed a pretext on which to refuse to consider my appeal from certain rulings, including partial summary judgment early in the litigation, and (more significantly and controversially) a procedural policy edict of the then-chief county judge. In a certiorari petition I filed with this Court in that litigation, *Beverly B. Mann v. The Upjohn Co.*, No. 01-1486 (App. K), I detailed the many inaccuracies of fact in the state appellate opinion—inaccuracies picked up in the federal appellate court's Aug. 31 order. That order ended with the following directives:

> We therefore direct Mann to show cause, if any he has, why she should not be ordered "to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." We limit this order to costs and expenses the defendants have incurred in the federal portion of the litigation. Mann may file her response within 14 days. Within the same time, defendants should file with the court an estimate of the total expenses they have incurred in both the district court and this court. This should include an estimate of the market value of the services provided by their in-house legal staffs. See *Central States Pension Fund v. Central Cartage Co.*, 76 F.3d 114 (7th Cir. 1996)....

On September 13, 2001, I filed my response to the federal appellate court's Aug. 31 show-cause order. (App. E.) In 17 single-spaced pages, I responded to each of the court's assertions of fact, of state law, and of federal law—none of which had been asserted by the defendants or by anyone else until the issuance of that order—upon which the court said it based its resolution of the appeal and its show-cause directive. The first six pages refuted, point by point, the factual inaccuracies taken from or inferred from the state appellate opinion in the products-liability case. The 11-page remainder, set out in a separate section, meticulously refuted the court's factual misstatements about Illinois law that I recited above, including discussion of *Vaughan Oil* and of how the Illinois courts are funded and of where the fee I was challenging

actually goes and what it does and does not fund. I said I had been unaware of *Pennzoil* and of the Tax Injunction Act but that neither applied in my case, and as I've done here but in 11 single-spaced pages of detail and argument, explained why.

On Sep. 19, the court issued a two-paragraph order requiring me to pay $5,180.00, the amount stated in the defendants' counsel's statement of costs and "fees," to the Office of the State's Attorney of Cook County. (The court included the Sept. 19, 2001, order in its disbarment opinion as Appendix B.) The order said I had not justified my filings and took the half-sentence in which I said I had been unaware of *Pennzoil* and of the Tax Injunction Act and represented it as the extent of my response to the show-cause order. The order did not acknowledge that I had argued (with elaborate specificity) that under Illinois law neither *Pennzoil* nor the Tax Injunction Act was an available affirmative defense and that the products-liability case and the fee-challenge case were not the same lawsuit.

I did not comply with the order, and on Oct. 16, 2001, citing *Support Systems Int'l v. Mack*, 45 F.3d 185 (7th Cir. 1995), the court barred me from filing any documents of any kind in any federal court within the circuit, unless I am indicted in federal court there, in which event I can defendant myself. I filed a petition for writ of certiorari, *Mann v. Brown*, No. 01-856, cert. denied, 534 U.S. 1131 (2002), seeking review of the Aug. 31, the Sept. 19, and Oct. 16 orders.

D. The Disbarment Matter

On May 29, 2002, the appellate court submitted a five-sentence "charge" letter about me to the Illinois Attorney Registration and Disciplinary Committee. The ARDC dismissed the charge on Sept. 3, finding that I had violated no Illinois rule of professional conduct including Illinois Rule of Professional Responsibility 3.1, titled "Meritorious Claims and Contentions". (Sept. 3, 2002, two- three-sentence letter, which I've misplaced, saying only that the Commission was dismissing the charge.) Meanwhile, on Jun. 18, 2002, the

Court of Appeals initiated its own disbarment proceeding, issuing a one-paragraph show-cause order that I would best describe as generic. (App. C.) I requested clarification, but was told the Oct. 16 "*Mack*" order barred my request, so I filed a response in which I said I was uncertain what the charge(s) were and so was covering all bases I could conceive. On Jul. 8, the court issued a clarification order, which was not clear but which (it turned out) limited the charge to my refusal to pay the sanction. (App. D.) As per that order, I filed a new response. I also requested a Rule 46 hearing, which occurred on Oct. 16. (Tr. at App. F.) I discuss below my written and oral arguments to the court.

On Nov. 1, 2002, the court issued its opinion removing my name from the roll of attorneys authorized to practice before it. (App. A.) I filed a petition for rehearing (en *banc* also), which was denied on Nov. 26. (App. B.) The six Questions Presented in this petition reflect my arguments to that court.

On November 15, 2002, I received a letter from an assistant Cook County State's Attorney notifying me that she had "caused a certified copy of the judgment entered against [me] on September 19, 2001 by the United States Court of Appeals for the Seventh Circuit to be filed with the Office of the Cook County Recorder of Deeds" and that if I did not remit payment within the following 14 days she "will institute legal proceedings against" me. I phoned her and said the order was not a judgment, which I said is a court resolution of a legal controversy between parties and is issued by a finder of fact after due process concerning those issues. I said a sanction order is enforceable only but the sanctioning court, not in a satisfaction-of-judgment proceeding in another court. A few days later, I submitted a motion to the federal appellate court requesting that court to clarify whether it had retained jurisdiction in the sanction matter; I attached a copy of the letter I had received and said I needed to know whether a state court would have jurisdiction in the matter. On Nov. 22, 2002, I received an order from the appellate court clerk's office returning my motion unfiled, citing the Oct. 16, 2001 *Mack*

order. (App. J.) I've heard nothing further about this from the State's Attorney's office.

On Nov. 25, 2002, an article about the disbarment opinion appeared on p. 1 of *The Chicago Daily Law Bulletin*. The article was republished in the Jan. 2003 edition of the *Law Bulletin*'s sister publication, *The Chicago Lawyer*. Since then, in another legal matter in which I'm involved and in the refiled lawsuit in the § 105/27.2a(k)(4) matter, I've received copies of documents field by my opponents essentially adopting the federal court's *ad homonym* verbal assaults, some of them verbatim. In the refiled § 105/27.2a(k)(4) matter, my opponents are asserting as affirmative defenses the doctrines of *res judicata* and (weirdly, in my opinion) law of the case, and are resting those claims upon the statements in the Aug. 31, order. On my rare visits to downtown Chicago, I've run into old acquaintances who ask about what I've now dubbed simply "it," which I recognize will follow me for the rest of my life. And I'm already sick to death of it.

SUMMARY OF ARGUMENT

I argue that the court's opinion treats prejudgment due process as procedurally discretionary on the part of the court and thus renders the Fifth Amendment's due process clause a mere suggestion—fundamentally deviating from (or perhaps altering) normative constitutional jurisprudence. I argue that by treating a sanction as a "judgment" for purposes of its enforcement effect—with all the consequent legal obligations and entitlements that accrue and with the arm of legal sanctions to compel its compliance—while removing procedural due process as a requisite to a judgment, the court profoundly alters the jurisprudential legitimacy of the term "judgment". I argue further that an order entered *sua sponte* and *ex parte*, and without the availability of appellate review of the correctness of the order under the *facts* and *existing* pertinent law (as would be available were it a trial court rather than an appellate court that issued the *sua sponte* order), is *void* or is at the least collaterally challengeable. I argue that a

sua sponte judgment is not a judgment *on a case or controversy before the court*, at least not a case or controversy between the *parties* in that case, and so courts lack Art. III subject matter jurisdiction to issue such orders. Citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), I argue that the entry of such an order is an *ultra vires* act.

I argue also that because three of the four lawsuits on which the sanction order was based were not cases before that court, the court lacked personal jurisdiction over me in three of the four lawsuits in which it collectively sanctioned me under 28 U.S.C. § 1927, and I say that *State Farm Mutual Automobile Ins. v. Campbell*, 123 S. Ct. 1513 (2003), removed any doubt about this that existed when I argued this to the Court of Appeals. And citing *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957), I argue that the order would be void, or at least collaterally challengeable.

I argue also that *State Farm* clarified that punishments assessed by courts in civil matters must comport with substantive due process and cannot be imposed without procedural due process. And I challenge as delusional that the right to file a petition for rehearing and to seek review in this Court combine to satisfy the Fifth Amendment's procedural due process guarantee.

I dispute the Court of Appeals' claim that *BE&K Construction Co. v. NLRB*, 122 S. Ct. 2390 (2002), limits First Amendment right-to-petition considerations to administrative law proceedings and to antitrust matters that are litigated in an Art. III court. I contend that what was at issue in *BE&K* was the circumstances under which the American Rule of fee-shifting can be abrogated. The NLRA Act is silent on that and therefore, *BE&K* says, it is presumed not to abrogate it; thus the First Amendment "objectively baseless" test enunciated in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), is applicable. But neither does the language of 28 U.S.C. § 1927 abrogate the American Rule; to the contrary, that statute limits its authority expressly to unreasonable and vexatious litigation. And I argue that the 7th Circuit Court of Appeals' amorphous definition of the term

"frivolous lawsuit," in my case and in other cases as well, violates the First and Fifth Amendments. I argue, citing *Canatella v. State of California*, 293 F.3d 1099 (9th Cir. 2002), that the unbridled power of an appellate court to sanction attorneys under 28 U.S.C. §1927 absent a clear definition of the type of conduct that is sanctionable, and absent procedural due process and a finding that the litigation at issue was objectively baseless, permits (in essence) judicial censorship of access to the courts and operates as a potential prior restraint that infringes upon the right to petition the government, and that this is especially so in cases such as mine, in which the sanction is for having filed a lawsuit not against a private party but against a government and in which the purpose of the lawsuit is to contest the constitutionality of codified or uncodified government policy.

And citing *BE& K* and *Agostini v. Felton*, 521 U.S. 203 (1997), I ask the court to vacate Oct. 16. 2001, order that bars my access to the federal courts within the 7th Circuit.

I also challenge Federal Rule of Appellate Procedure 46(b)(1)(B) as unconstitutionally vague, and read *Parker v. Levy*, 417 U.S. 733 (1974), upon which the court relied in my case, as the district court in *Spargo v. New York State Commission on Judicial Conduct*, 1:02-CV-1320 NDNY (Feb. 20, 2003) read it.

REASONS WHY THE WRIT SHOULD BE GRANTED

The appellate court has enunciated a rule of law that effectively eliminates procedural due process as a prejudgment requisite and that in practice, at least in most instances, eliminates due process also as a post-judgment corrective. The court's opinion treats prejudgment due process as procedurally discretionary on the part of the court and thus renders the 5th Amendment's due process clause a mere suggestion—fundamentally deviating from (or perhaps altering) normative constitutional jurisprudence.

By treating a sanction as a "judgment" for purposes of its enforcement effect—with all the consequent legal obligations

and entitlements that accrue and with the arm of legal sanctions to compel its compliance—while removing procedural due process as a requisite to a judgment, the court profoundly alters the jurisprudential legitimacy of the term "judgment". It defies reason to hold that although Federal Rule of Civil Procedure 65(b)(1) narrowly circumscribes the conditions under which a *district* court can issue a temporary restraining order *ex parte* and severely limits the length of effect of a TRO absent notice and a meaningful opportunity for hearing, *appellate* courts may, *sua sponte* and subject to no due process constraints whatsoever, issue a *judgment*—an order determining with finality the rights and legal obligations of those who are subject to it. Surely Rule 65(b)(1) has a constitutionally mandated component to it, a component unaffected by any distinction between district and appellate courts.

At the disciplinary hearing on Oct. 16, I challenged Judge Easterbrook's reference to the sanction order as a "judgment". (App. F.) He said that sanctions orders are judgments, even when issued *sua sponte* and *ex parte* by an appellate court. He equated a permanent order issued by an appellate court *ex parte* and *sua sponte*—an order effectively unchallengeable post-entry even via appeal, that compels or bars specific action—with a temporary restraining order. Stunned, I opened my mouth to respond. Apparently recognizing the fault with the analogy, the judge cut me off. Yet the disbarment opinion he wrote, although it does not mention TROs, effectively adopts the analogy and finds such orders unassailable collaterally.

But normally it is procedural due process that *permits* the issuance of a permanent order; that's what makes due process a right, something with genuine value as opposed to a platitude. Judge Easterbrook's opinion holds the reverse, or at least it finds procedural due process irrelevant to the enforceability of a permanent order and to the consequences for refusal to comply with it. I ask this Court to clarify that it is procedural due process that permits the issuance of a permanent order, rather than the reverse. I ask that this Court

clarify that a court's designation of an order as permanent, or as a judgment, does not erase the right to procedural due process as requisite to the issuance of the order. And I ask that this Court hold that an order entered *sua sponte* and *ex parte*, and without the availability of appellate review of the correctness of the order under the *facts* and *existing* pertinent law (as would be available were it a trial court rather than an appellate court that issued the *sua sponte* order), is void or is at the least collaterally challengeable.

Because three of the four lawsuits on which the sanction order was based were not cases before that court, the court lacked personal jurisdiction over me in three of the four lawsuits in which it collectively sanctioned me under 28 U.S.C. § 1927. At the disciplinary hearing, I likened its action to an appellate court simply leafing through the phone book and randomly selecting names and addresses and issuing orders compelling the payment of money, or the transfer of real estate deeds, or of securities. I then narrowed the analogy to litigants selected randomly from a court's database, or to attorneys selected randomly from the roles of those authorized to practice before that court. I asked rhetorically whether an appellate court could simply slap a caption from a pending appeal onto a random order compelling the payment of money or the transfer of property to someone – perhaps the opposing party, perhaps someone else – utterly independent of any issue in the litigation bearing that caption, and thus acquire jurisdiction to issue the order. I argued that I would not, and citing, *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957), I said I believed the order would be void or at least collaterally challengeable. In support I referenced a comment by Justice Scalia writing for the court in *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998) (although I did not state the name of the case, and identified the comment solely by its author) that a court's ruling on a matter in which the court had no jurisdiction to do so is, by definition, an *ultra vires* act. I reiterate those arguments.

The very concept of such a *judgment*, issued *sua sponte* and *ex parte* by an appellate court, is ridiculous; it's an *ultra*

vires act, and not just because of the utter absence of due process. A *sua sponte* judgment that requires the payment of money or the performance of (or the refraining from) a specific act is not a judgment *on a case or controversy before the court*, at least not a case or controversy between the *parties* in that case; thus courts lack Art. III subject matter jurisdiction to issue such judgments. No other court, in any other reported opinion (none that I've found after extensive research, anyway), has claimed such power for itself. And my research has disclosed no other reported case anywhere in the country in which a sanction of any kind has been imposed under a circumstance even remotely similar to that in my case. Nor is there any other reported case in which an appellate court recognized that it had imposed a *sua sponte, ex parte* sanction *in error* yet enforced the sanction nonetheless.

The court in its disbarment order confuses the *sue sponte, ex parte* sanction order with the order that resolved the appeal. The court also seems to confuse the defendants with itself. It treats the sanction order as though it were *the sanction* that was the subject of the litigation rather than a fabrication by the court out of the blue. But the *sanction order*, issued as it was *sua sponte* and without prior notice to *either* party, resolved no controversy whatsoever between the defendant and me. It mediated no right, no claim, no contest, as between us that we had brought to the court. The court thus fundamentally misrepresents the character of the order with which I refused to comply, and consequently the nature of my defiance of that court order, when it casually refers to the sanction order as a ruling that resolved the litigation.

That characterization and the court's offhanded depiction of me as a disappointed litigant unwilling to accept a litigation loss are sheer fancy, all the more so because I did not actually lose the litigation itself. As I note above, I refiled it in state court and it remains pending. The court's equating me with the 50% of litigants who lose in litigation on the issues presented by the litigation itself strikes me as something out of Never Never Land. I did not refuse to accept or comply with the resolution of the appeal; I did not try to refile the fee-

challenge case in federal district court in contravention of the resolution of the appeal itself. Instead I refiled it in state court, as was my right under Illinois law. The only order that I refused to accept and to comply with is unrelated to any issue presented by the parties to the litigation. And I claim that that order is void or collaterally voidable as an *ultra vires* order.

As the court's opinion reads, there is nothing to prevent a court from doing those things and from then issuing a contempt citation or initiating a disbarment proceeding for failure to comply. The court opinion holds outright, in a ruling that seems to me at a minimum contrary to the essence, if not the specifics, of *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), that the only procedural process due before a court issues a sanction derivative of an earlier order that compelled someone to do something is a hearing to determine whether the underlying order has been complied with; the utter absence of due process in issuing the underlying order is not a permissible defense to the derivative sanction. An appellate court may enter a judgment based upon, literally, nothing at all. Or so that court claims as a power that it possesses.

This statement of law accords appellate courts unbridled authority, not only to randomly select litigants or attorneys or (theoretically, because the court's opinion draws no line at all) anyone else for such treatment, but—worse, because it's far more likely—to *carefully* select litigants or attorneys for such treatment, on the basis of who they are, or whom they represent, or the *type* of cases they're associated with. It encompasses the authority to censor access to federal courts. Indeed the vitriol that court spews at me in its Aug. 31 order begins with a pronouncement that my lawsuit was absurd.

Judge Easterbrook has said outright that his court has the *ex parte* authority to invoke *sua sponte* defenses on behalf of civil defendants. This would appear to revoke the doctrines of issue forfeiture and waiver as applied to civil defendants and to revoke procedural due process as a matter of right pertaining to their opposing plaintiffs. See *Hampton v. Wyant*, 296 F.3d 560 (7th Cir. 2002). But the doctrine remains intact for use when wanted. ("[C]ourts normally do not force parties

to file particular defenses or claims; our reported cases are replete with examples of both claims and defenses that are waived." (See *Adkins v. Illinois Central R.R.*, 2003 U.S. App. LEXIS 3936 (7th Cir. 2003); "The plaintiff missed a better argument.... However, the argument has been waived, so both rulings that the plaintiff has appealed from are affirmed." *Stephan v. Goldinger*, 2003 U.S. App. LEXIS 6593 (7th Cir. 2003).)

Saying that "it is the sleepwalking judge, not the diligent one, who deprives the litigant of the personal right to careful, individual consideration," he mused that "[a]ny time a judge does independent research there is a risk of error, but judges with some initiative probably err at lower rates than judges who naively believe that the briefs cover everything worth considering." This removes any semblance of procedural due process and of the adversarial process. It is the very embodiment of judicial advocacy on behalf of a litigant, and thus of judicial partiality. But if an appellate judge opts to play that role, does he not then have the responsibly to actually *do* what Judge Easterbrook said is its justification for the sweeping mandate he claims? To *not* sleepwalk? To *be* diligent? To *not* deprive the litigant of the personal right to careful, individual consideration?

He acknowledged that the absence of any input by the plaintiff might lead to an erroneous result, but said the right to file a petition for rehearing and to file a certiorari petition suffice as due process. "These afforded ample opportunities to point out any errors in the appellate court's independent research," he wrote, apparently confusing ample opportunities to point out errors with ample opportunities to have those errors corrected. This Court, which now presets its argument at 78 cases per term, no longer functions as a reviewing court.

At the Oct. 16 disciplinary hearing, when I argued (as I do here) that a judgment entered in the absence of even basic procedural due process is void or at least collaterally voidable, Judge Easterbrook said the availability of the option to file a certiorari petition sufficed as due process. I replied that this Court does not operate as a reviewing court, that it operates

solely as a quasi-legislative body. I cited to *Overton v. Ohio*, 122 S. Ct. 389 (2001), a dissent by four justices to the refusal of this Court to summarily reverse a ruling of the Ohio Supreme Court that was in direct conflict with this Court's precedent, the sole basis for the Court's denial of the petition being that the Court does not operate as a reviewing court.

Judge Easterbrook did not dispute my characterization of this Court's function, yet he claims the apparition of this Court as due process. Nor is the right to file a petition for rehearing any more substantive that the right to file a certiorari petition. That court does not grant them. In response to my 17-page, single-spaced response to that court's Aug. 31, 2001 show-cause order—which served the function of a petition for rehearing—that court said I had acknowledged the *sua sponte* affirmative defenses as *valid* and pled only ignorance of them. Actually I had said I was ignorant of them but that they were *invalid*, and recited in detail why.

Earlier this year, in a case called *Hoskins v. Poelstra*, 320 F.3d 761 (7th Cir. 2003), Judge Easterbrook wrote in reversing the dismissal of a *pro se* complaint that "when exercising discretion to review complaints, judges must take care that initial impressions, and the lack of an adversarial presentation, not lead to precipitate action that backfires and increases the duration and cost of the case." Nice. He explains that the district judge's "eye was caught by the complaint's allegation that John Poelstra (a private citizen) conspired with the state actors to violate Hoskins's rights." Thus the precipitate action. Oh.

In my case, Judge Easterbrook's eye was caught by the convergence of a quadfecta of his fixations. He's obsessed with matters jurisdictional and state-comity-related, and has fetishized *Pennzoil* and *Rooker-Feldman* and invokes those doctrines with the fervor of a zealot. He rages against anyone who challenges (or seems to be challenging) the private financial costs of litigation vis-à-vis the costs to government of maintaining the civil justice system. He fumes at those who challenge the constitutionality of laws or public policies, because he believes in an almost pure democracy, in a system

by which the only check on legislative, executive and judicial power is the ballot box, in a system in which the judicial check on legislative and executive powers is cosmetic, and he imposes that belief. All jurisdiction is personal. All constitutional law is local.

He's given the term "frivolous lawsuit" a remarkably amorphous quality, so that any claim to which there exists a plausible affirmative defense or (as in my case) an affirmative defense that has no basis in law but that the appellate court asserts nonetheless on behalf of the defendants fits the definition. This loose definition renders meaningless any requisite finding of "frivolousness" before a sanction can be imposed.

The effect is to foreclose access to federal court as a forum in which to challenge the constitutionality of state or municipal laws. And because Illinois is a state in which the judiciary is compiled through a highly political process that entails the collection of large campaign donations and the nod of the political slate makers, the foreclosure of access to federal court effectively forecloses access to court in any challenge to government. (See, "Who knew? Key to becoming judge is who you know," *Chicago Sun-Times*, April 29, 2003 (App. L).) In Illinois, the same clout-heavy trade groups that monopolize access to the legislative and executive branches also monopolize access to the state's Supreme Court, and they alone may challenge the constitutionality of statutes and ordinances.

"Courts frequently decide cases on lines of reasoning that can not be found in the briefs," Judge Easterbrook said in *Hampton*. But when those lines of reasoning are entirely new defenses rather than a different line of reasoning in a defense that had been asserted, and the plaintiff learns of the defenses only when the appeal is decided on its basis, it violates the plaintiff's due process. And when a sanction is imposed in that manner that shifts the fee for the entire litigation, it most certainly does.

Anyone who doubts the value of due process, the value of input by a plaintiff against whom a *sua sponte* affirmative defense is asserted, need only read the transcript of oral

argument in *General Auto Service Station LLC v. City of Chicago*, 319 F.3d 902 (7th Cir. 2003) (App. H), and then read Judge Easterbrook's opinion (App. I), and compare them with the Aug. 31, 2001 order he wrote in my case. The case addresses the preclusive effect (none) under Illinois law of an Illinois judge's denial of a motion for intervener. Suffice it to say that there was no finding of unreasonable and vexatious multiplication of the litigation, and no fee-shifting sanction was imposed. The right to due process before important personal rights, obligations and penalties are permanently determined surely entails more substance than just the right to file petitions after the fact. Court citation to an anachronistic hierarchy of authority does not suffice either.

In my written response to the disbarment show-cause order I relied substantially upon *BE&K*. I agued that 28 U.S.C. §1927 as applied to me violated the First Amendment's right-to-petition clause because the lawsuit in which the sanction was imposed was neither objectively baseless nor was it filed and litigated in bad faith. In rejecting this argument, the court interpreted a sentence near the end of *BE&K* as extending the right-to-petition protection only to bar fee-shifting as a sanction imposed by administrative agencies. But the "objectively baseless" test of *BE&K* was adopted from *PREI*, an antitrust case litigated entirely in Art. III courts. I also noted the reiteration in *BE&K* that the Supreme Court earlier had "recognized this right to petition as one of the most precious of the liberties safe-guarded by the Bill of Rights." I said it was implausible that *BE&K* was intended to limit right-to-petition considerations to administrative law proceedings and antitrust litigation. What was at issue in *BE&K* was the circumstances under which the American Rule of fee-shifting can be abrogated. The NLRA Act is silent on that and therefore, *BE&K* says, it is presumed not to abrogate it; thus *PREI's* First Amendment "objectively baseless" test is applicable. But neither does the language of 28 U.S.C. §1927 abrogate the American Rule. To the contrary, that statute limits its authority expressly to unreasonable and vexatious litigation. I ask this Court to clarify whether, by that

referenced sentence, it intended to limit First Amendment right-to-petition considerations to administrative law proceedings and antitrust matters litigated in Art. III court.

I also refute as absurd the appellate court's suggestion that constitutional rights requisite to the imposition of a criminal or civil sanction accrue only if the substantive law allegedly is itself unconstitutional. (In this instance the right at issue was procedural due process, but presumably this rule, if it is one, also such rights as representation by counsel, the right against self-incrimination, and the right to be free of unreasonable searches and seizures) The court suggested as much in its discussion of the applicability of the holding in *BE&K Construction* to sanction imposed under 28 U.S.C. §1927; it appears to have held that I could not challenge the constitutionality of the sanction imposed against me as violative of the Fifth and First amendments because *BE&K Construction* indicated that fee-shifting-sanctions statutes such as §1927 were not in themselves unconstitutional.

But the holding of *BE&K Construction* was that the fee-shifting rule at issue there was *not* itself unconstitutional; it was the *sanction* issued in that case, not the fee-shifting rule invoked to issue the sanction, that violated the First Amendment because the sanction was imposed *absent a finding of fact* that comports with the First Amendment right to petition the government as described in *PREI*.

In my written response to the show-cause order, I relied also upon *Canatella v. State of California*, 293 F.3d 1099 (9th Cir. 2002), amended at 304 F.3d 843. In that case, an attorney challenged specific California disciplinary rules as unconstitutionally overbroad, although he had not been sanctioned under the rules He claimed that the overbreadth of the rules imposed a prior restraint on actively protected under the First Amendment. In reversing the dismissal of the case for lack of standing to bring it, the court relied upon *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973), and *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984), in finding that it did impose an unconstitutional prior restraint on the right to petition the government through the courts.

I also ask this Court in light of *BE&K* to vacate the Oct. 16, 2001, order that continues to bar my access to the federal courts within the 7th Circuit. (App. J). Like the order in *Agostini v. Felton*, 521 U.S. 203 (1997), the "*Mack*" order remains in effect; it continues to bar my access to the federal courts within the 7th Circuit. *BE&K* renders it now clearly inappropriate, both because it bars my access to the courts and because it was issued as a sanction for the failure to comply with a sanction order that itself violated the right to petition as stated in *BE&K*.

I challenge Federal Rule of Appellate Procedure 46(b)(1)(B) as unconstitutionally vague. In rejecting that argument the court relied upon *In re Bithoney,* 486 F.2d 319 (1st Cir. 1973), which, the court said is, as far as it can tell, the only opinion that considered a due process challenge to that Rule, and which held that it gives lawyers adequate notice. The court also relied upon *Parker v. Levy,* 417 U.S. 733 (1974), which considered a due process challenge to a somewhat comparable provision, Article 133, of the Uniform Code of Military Justice, found that that provision met due process standards. *Bithoney* and *Parker*, the court wrote, "observed that long traditions and compiled rules of the legal and military professions flesh out the elliptical 'conduct unbecoming' standard." The opinion in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), for the collateral-bar rule and Ill. R. Prof. Conduct § 8.4(a)(5) for the proposition that ("A lawyer shall not ... engage in conduct that is prejudicial to the administration of justice."). Both are offered as evidence that I knew I was expected to comply with the order. But that's not the issue here.

Spangler relied entirely upon the facts that the order that was defied resolved the issues that were orderly litigated between the parties, and that that order was a continuing injunction and thus there existed a mechanism by which to challenge its continued effect. In my case, by contrast, the order neither resolved issues between the parties nor resolved issues that were orderly litigated—or, for that matter, were litigated all. And there was never, much less is there now, a

mechanism by which I could challenge its propriety. And as for Ill. R. Prof. Conduct § 8.4(a)(5), the Illinois A.R.D.C. cleared me of violating exactly that provision; I wish to emphasize that. So, yes, I knew what was expected of me. But the question is whether in that instance I was bound by what was expected of me or whether instead, given the circumstance—which was that the two grounds for the ruling in *Spangler* were absent in my case —I was not.

As for the applicability of *Parker*, I quote the following from *Spargo v. New York State Commission on Judicial Conduct*, 1:02-CV-1320 NDNY (Feb. 20, 2003), citing *Parker*: "'One to whose conduct a statute clearly applies may not successfully challenge it for vagueness'. However, when the challenge is grounded in the First Amendment, there is an exception to this general principle that a facial challenge is precluded.16 Id." As *Spargo* notes, *Parker* "did not find, as defendants suggest, that in the context of a civilian, such as *Spargo*, the general rule (rather than the exception) applies."

Conclusion

This has been a Kafkaesque trip that began because I filed a civil rights lawsuit in federal court challenging the constitutionality of a state court-record-preparation-fee statute. Unless this court reverses the disbarment, I'll spend the rest of my life faced periodically with having to explain to some agency, to some opponent, to ... someone, why I was disbarred by a federal appellate court. No lawyer, and no litigant, should endure what I have and what I will if this Court denies this petition because she filed a non-frivolous lawsuit in compliance with applicable law and was never accorded the opportunity to say that when it might have mattered. The practice of law and the invocation of the right to use the courts in a civil proceeding should not be so perilous.

I also ask that this Court vacate the Oct, 16, 2001 order barring my access to the federal courts within the 7th Circuit.

Respectfully submitted,

Beverly Mann

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In the matter of: BEVERLY B. MANN, Respondent.

No. D-02-0005

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

311 F.3d 788;2002 U.S. App. LEXIS 27408

October 16, 2002, Heard

November 1, 2002, Decided

DISPOSITION: [*1] Respondent was removed from the roll of attorneys authorized to practice.

COUNSEL: BEVERLY B. MANN, Plaintiff - Appellant, Pro se, Chicago, IL USA.

For COOK COUNTY, DOROTHY BROWN, Defendants - Appellees: Mary D. Mallo, Markham, IL.

JUDGES: Before EASTERBROOK, KANNE, and WILLIAMS, Circuit Judges.

OPINIONBY: EASTERBROOK

OPINION: EASTERBROOK, *Circuit Judge*. Earlier this year we directed attorney Beverly Mann to show cause "why she should remain a member of this court's bar with unpaid sanctions entered against her. See Fed. R. App. P. 46(b)(1)(B)." She filed a written response and asked for a

hearing, as was her right under Rule 46(c). That hearing has been held, and the matter is ready for decision.

What led to the court's order is Mann's refusal to pay financial sanctions entered under 28 U.S.C. § 1927 for unreasonably and vexatiously multiplying the proceedings in an earlier case. Those orders, previously unpublished under Circuit Rule 53, are attached as appendices to this opinion so that the reader may understand the background.

Mann defends on the theory that our award of sanctions was erroneous, [*2] which in her view excuses any need to comply. She tells us that she plans to wage a collateral attack on our orders sometime in the future, in some other circuit. How there could be either jurisdiction or venue for such a challenge Mann does not explain. But whether or not the orders are subject to collateral attack, the fact remains that they are still in force. Even orders entered *ex parte* must be obeyed while they remain outstanding, no matter how erroneous the addressee believes them to be. See, *e.g.*, *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 438-40, 49 L. Ed. 2d 599, 96 S. Ct. 2697 (1976). It is unthinkable that a lawyer who claims a privilege to disregard any final decision with which she does not agree could remain in good standing at the bar. Such a lawyer would be a hazard to clients and to herself, as well as to the courts. Half of all litigants (the losing half) may believe that the decision is incorrect, but it is essential to the operation of any legal system that unsuccessful litigants abide by the judgment unless they can persuade a higher court to set it aside. See *Homola v. McNamara*, 59 F.3d 647 (7th Cir. 1995). [*3]

At the hearing under Rule 46(c) Mann did not advance any extenuating circumstance (such as financial difficulties) or any legal reason why a lawyer who claims a right to disregard judgments should remain in good standing. This court

recognizes that some of our decisions are incorrect--nomination by the President and confirmation by the Senate do not confer infallibility--but *whether* a given order is mistaken must be resolved through the legal process (petitions for rehearing or certiorari) rather than by the unsuccessful litigant's unilateral action. The Supreme Court denied Mann's petition for certiorari to review our decision. See 534 U.S. 1131 (2002). The underlying litigation is over. Only compliance remains--but it has not been forthcoming.

Mann contended in her written response that the first amendment precludes any sanctions for misconduct during litigation. The problem, however, is what occurred *after* the litigation--obdurate refusal to comply with the final decision. Defiance of a judicial order is not a "petition [to] the Government for a redress of grievances" protected by the first amendment. See *Cooper v. Aaron*, 358 U.S. 1 (1958). [*4] Objecting to the sanction itself is a form of collateral attack that we will not entertain. At all events, *BE&K Construction Co. v. NLRB*, 153 L. Ed. 2d 499, 122 S. Ct. 2390 (2002), the decision on which Mann principally relies, does not establish that using § 1927 to shift attorneys' fees violates the Constitution. The Court made this clear: "Nothing in our holding today should be read to question the validity of common litigation sanctions imposed by the courts themselves ... or the validity of statutory provisions that merely authorize the imposition of attorney's fees on a losing plaintiff." 122 S. Ct. at 2402. See also, e.g., *Chambers v. NASCO, Inc.*, 501 U.S. 32, 115 L. Ed. 2d 27, 111 S. Ct. 2123 (1991); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 65 L. Ed. 2d 488, 100 S. Ct. 2455 (1980).

Her further argument that Rule 46 is unconstitutionally vague fares no better. True enough, Rule 46 adopts for the courts of appeals an open-ended standard of lawyers' deportment rather than a list of disciplinary rules, as all states and many district

courts have done. According to Rule 46(b)(1)(B), a lawyer who "is guilty of [*5] conduct unbecoming a member of the court's bar" may be disciplined or disbarred. As far as we can tell, this provision has been challenged on due process grounds only once before, and *In re Bithoney*, 486 F.2d 319 (1st Cir. 1973), held that it gives lawyers adequate notice. Less than a year later, the Supreme Court came to the same conclusion with respect to Article 133 of the Uniform Code of Military Justice, which makes it a crime for a commissioned officer to engage in "conduct unbecoming an officer and a gentleman." See *Parker v. Levy*, 417 U.S. 733, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974). *Bithoney* and *Parker* observed that long traditions and compiled rules of the legal and military professions flesh out the elliptical "conduct unbecoming" standard. See also *In re Snyder*, 472 U.S. 634, 645, 86 L. Ed. 2d 504, 105 S. Ct. 2874 (1985). We agree with and follow *Bithoney* today.

Given the collateral-bar rule discussed in *Spangler* and the holding of *Cooper*, no reasonable lawyer could believe herself entitled to disregard judicial decisions that bind her *in personam*--even decisions that the lawyer sincerely believes [*6] to be erroneous. See also Ill. R. Prof. Conduct § 8.4(a)(5) ("A lawyer shall not ... engage in conduct that is prejudicial to the administration of justice."). A lawyer may advise a client to disobey a judicial order when that step is essential to secure appellate review, see *Maness v. Meyers*, 419 U.S. 449, 42 L. Ed. 2d 574, 95 S. Ct. 584 (1975), but once the judicial process has run its course the order must be implemented. *Chambers* and *Roadway Express* depict lawyers' flouting judicial orders as the paradigm of sanctionable conduct. Mann thus had notice of what was expected. She could have avoided discipline by complying with the decision even after we issued the order to show cause, but she has steadfastly refused to do this. Now she must

accept the consequence of her choices.
Beverly Mann is removed from the roll of attorneys authorized to practice in this court.

Appendix A

United States Court of Appeals For the Seventh Circuit

Chicago, Illinois 60604

Submitted August 15, 2001 *

----------Footnotes----------

* After an examination of the briefs and the records, we have concluded that oral argument is unnecessary, and the appeals are submitted for decision. See Fed. R. App. P. 34(a); Cir. R. 34(f).

----------End Footnotes----------

[*7]

Decided August 31, 2001

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

BEVERLY B. MANN, *Plaintiff-Appellant,* v. DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and COOK COUNTY, ILLINOIS, *Defendants-Appellees.*

Nos. 99-1750 & 99-3595

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Harry D. Leinenweber, *Judge.*

Order

This is the culmination of an absurd, and absurdly protracted, effort by a lawyer who filed a tort suit in state court to litigate particular issues in federal court. Beverly Mann filed a products-liability suit against Upjohn Company. After dismissing that suit in 1992 to avoid the judge's order that she submit to discovery, Mann filed again in 1993, and again failed to provide information in discovery despite judicial orders requiring her to do so. Mann took the position that she alone would decide what information Upjohn received. Ensuing sanctions hampered her ability to present evidence at trial. Mann turned to federal court, asking for an order compelling [*8] the state court to grant a continuance. That quest was unavailing. When the case was called for trial in April 1998, Mann, a member of the bar representing herself, refused to proceed. The judge dismissed the suit for want of prosecution, and Mann appealed. Under 705 ILCS 105/27.2a(k)(4) she had to pay a record-preparation fee of $ 150 plus 25 [cents] for each page over 200. This was no more acceptable to Mann than the discovery rulings had been. She was willing to pay $ 150 for preparing the whole record (which weighed in at over 6,000 pages) but no more.

Supreme Court Rule 298 provides for full or partial waiver of the fee for those who are unable to pay it. Mann, who concedes ability to pay, contends only that paying the fee would be a "hardship." Abjuring the means provided by state law for relief, Mann asked the judge in the state case to declare § 105/27.2a(k)(4) unconstitutional as a violation of the equal protection clause in the fourteenth amendment and as a

"hidden tax" in violation of the state's constitution, Art. I § 12 of which provides for access to the courts. This provision reads: "Every person shall find a certain remedy in the laws for all injuries and wrongs [*9] which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly." Mann's theory is that the charge exceeds the cost of preparing the record, is deposited in the county treasury, and thus is a "tax" on litigation that abridges the right of access.

After the trial judge denied Mann's request for relief, she did not appeal within the state system. Instead she filed a federal suit (No. 98 C 6078) under 42 U.S.C. § 1983, making the same constitutional arguments that had been presented to the state trial judge. This was dismissed under the *Rooker-Feldman* doctrine after the district judge concluded that it was just a (poorly) disguised attack on the decision of the state trial judge. See *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 68 L. Ed. 362, 44 S. Ct. 149 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983). Mann's next step was to file an original action in the Supreme Court of Illinois--seeking to invoke not Rule 298 (a request that should have been addressed to the trial or appellate courts) but [*10] Supreme Court Rule 381, which deals with challenges to revenue statutes. That court promptly denied Mann's request for leave to commence an original action. Mann also presented a new request to the trial judge in the products-liability case. That judge made it clear that the earlier decision had been, not on the merits, but procedural: The judge viewed Mann's motion as an inappropriate effort to convert the products-liability case into some new constitutional claim.

Mann could have appealed that decision within the state's

hierarchy but did not. Instead she returned to federal court, first by filing a Rule 60(b) motion in No. 98 C 6078 and, after that failed, by commencing a new federal suit, which was docketed as No. 98 C 8004. (She did not appeal the final decision in No. 98 C 6078.) In this new proceeding--Mann's third federal suit arising out of a single state action--Mann demanded an injunction, a writ of prohibition, and other relief against the state's implementation of § 105/27.2a(k)(4). This suit could have been dismissed on preclusion grounds; a disappointed litigant must appeal rather than file another suit, even if developments after entry of the first judgment show that [*11] the decision was incorrect. See *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (1981). But the defendants did not invoke the law of claim preclusion (res judicata). Instead they defended on the merits. The district judge concluded that the state judge's explanation lifted the *Rooker-Feldman* doctrine. Now, the federal judge believed, Mann was attacking § 105/27.2a(k)(4) itself rather than the state court's decision. (This is a doubtful proposition; Mann's only grievance is the state judicial system's application of § 105/27.2a(k)(4) to her appeal. But just as the Supreme Court avoided the *Rooker-Feldman* issue in *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 95 L. Ed. 2d 1, 107 S. Ct. 1519 (1987), we need not consider it here.) Nonetheless, this did Mann no good, because the district judge concluded that she is very unlikely to prevail on the merits and declined to afford interlocutory equitable relief. 1999 U.S. Dist. LEXIS 2804 (N.D. Ill. Mar. 2, 1999). Mann's appeal from this decision has been docketed as No. 99-1750.

While that appeal was being briefed, the district court dismissed [*12] Mann's complaint on the merits. 1999 U.S. Dist. LEXIS 13426 (N.D. Ill. Aug. 3, 1999). The court ruled that a fee for record preparation in an ordinary civil lawsuit is not subject to the special rules for criminal litigation by indigents, exemplified by cases such as *Griffin v. Illinois*, 351

U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1956), but is more like the filing fee in bankruptcy, see *United States v. Kras*, 409 U.S. 434, 34 L. Ed. 2d 626, 93 S. Ct. 631 (1973). The Supreme Court held in *Kras*, that a filing fee for bankruptcy is not unconstitutional even if set so high that some people cannot afford it; and if one can be too poor to go bankrupt, the district judge concluded, there is no possible constitutional objection to a fee in litigation that imposes a "hardship" on one who is able to pay. Mann's appeal from this decision has been docketed as No. 99-3595. Meanwhile the state appeal proceeded, and the judgment dismissing the suit has been affirmed. *Mann v. Upjohn Co.*, [324 Ill. App. 3d 367, 753 N.E.2d 452,] 2001 Ill. App. LEXIS 531, 257 Ill. Dec. 257 (1st Dist. June 29, 2001) [cert. denied, 153 L. Ed. 2d 180, 122 S. Ct. 2358 (2002)]. [*13] Either Mann paid the fee under protest or the state court decided to overlook the nonpayment. In neither event is the federal case moot. If Mann paid, she could get the money back if she were to prevail; and if Mann did not pay, the state may dun her for the money, or the lack of payment may impede review by the Supreme Court of Illinois (or future appeals Mann may pursue, for she is a frequent filer).

Defendants contend that the district court's judgment on the merits moots appeal No. 99-1750. For her part, Mann insists that the district court lacked jurisdiction to adjudicate the merits while No. 99-1750 was pending. Mann's position is incorrect. Although an appeal usually deprives the district court of jurisdiction to proceed, an appeal under 28 U.S.C. § 1292(a)(1) from the denial of an interlocutory injunction is an exception to that norm. See *Thomas v. Board of Education*, 607 F.2d 1043 (2d Cir. 1979); *Abramson v. University of Hawaii*, 594 F.2d 202 (9th Cir. 1979). So No. 99-1750 no longer matters, and that appeal is dismissed as moot. (Because the final judgment automatically supersedes the denial of interlocutory relief, [*14] it is unnecessary to vacate the

earlier decision under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 95 L. Ed. 36, 71 S. Ct. 104 (1950).)

As for No. 99-3595: We decline the parties' request to reach the merits. This case has no business being in federal court and should have been dismissed immediately after its filing. One reason is the Tax Injunction Act, 28 U.S.C. § 1341. Mann characterizes the charge as a "tax," and if that is correct then § 1341 bars any federal interference if a plain and speedy remedy is available in state court. Supreme Court Rule 298 offers one such remedy; asking the state's court of appeals for relief from the charge is another. Mann pursued neither. If, however, the charge is not a "tax" (and it hardly seems like one; Mann does not contend that the congeries of fees charged to litigants, including all filing and record-preparation charges, is a net money-raiser for the state after all expenses of running the judicial system have been accounted for) then § 1341 does not apply--but much of Mann's substantive argument is sunk. So far as the federal Constitution is concerned, it makes no difference whether fees [*15] go into the state (or county) treasury, which then underwrites the judicial system, or instead are deposited into a separate fund under the control of the courts.

Whether the fee is a "tax" does not matter in the end, however, because the district court should have abstained. This suit is a replay of *Pennzoil*, in which Texaco, having suffered a large judgment at trial in a state court, asked a federal court for relief against the bond that state law required as a condition of appeal. Texaco contended that the bond would serve as an *absolute* bar to appeal under the circumstances, a more grievous injury than the "hardship" of which Mann complains, and the source of a better constitutional argument. See *Lindsey v. Normet*, 405 U.S. 56, 31 L. Ed. 2d 36, 92 S. Ct. 862 (1972).

Still, the Supreme Court held, it would be inappropriate for a federal tribunal to interfere with ongoing state litigation. *See, e.g., Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971); 28 U.S.C. § 2283. Texaco had to present its constitutional arguments to the state judiciary, with the option to seek review in the Supreme Court [*16] under 28 U.S.C. § 1257. Mann should have proceeded in the same way. After the state's trial judge rejected her contention, she should have sought review within the state system and then, if necessary, by the Supreme Court of the United States. Instead she bolted to federal district court, which under *Pennzoil* can offer no relief.

Defendants have not sought abstention under *Younger* and *Pennzoil*, but federal courts are entitled to abstain on their own--not only to protect states from errors by their lawyers (the State's Attorney of Cook County, representing the defendants in this case, may not have the interests of the whole State at heart), and to avoid unnecessary decisions on constitutional questions, but also to protect themselves from impositions of the kind that Mann has perpetrated. See *Mazanec v. North Judson-San Pierre School Corp.*, 763 F.2d 845 (7th Cir. 1985). Mann contends that the fee violates the Constitution of Illinois as well as the Constitution of the United States. That argument, presented to a state court, could have avoided any need for federal decision, even by the Supreme Court on certiorari under § 1257. Moreover, [*17] the fact that the appeal in the state case has concluded does not lift the abstention doctrine; one may not avoid a state forum by waiting until its process has concluded. See *Nelson v. Murphy*, 44 F.3d 497 (7th Cir. 1995).

These proceedings not only imposed on the federal courts (and the defendants) but also appear to come within the scope of 28 U.S.C. § 1927:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Mann, an attorney, has multiplied these proceedings unreasonably and, in an objective sense, vexatiously. See *In re TCI Ltd.*, 769 F.2d 441 (7th Cir. 1985). The tort suit was filed, dismissed, refiled, and lasted for five more years before it was dismissed, on the date set for trial, because Mann refused to participate. Proceedings were marred by Mann's failure to follow judicial orders concerning discovery and by her generally [*18] inappropriate conduct. The state's appellate court rebuked Mann for "inexcusable" abuse of opposing counsel as well as "lack of cooperation ... in obeying court orders, indifference to the trial court's advice and admonishments, repeated attempts to delay the proceedings, and a failure to follow the rules of proper procedure." The state portion of this litigation included, in addition to the main case (filed twice and unduly dragged out) and the original action in the Supreme Court of Illinois, repeated efforts to disqualify a judge. The federal portion has included the three suits we have mentioned plus additional motions to disqualify, requests for sanctions (Mann's motions were denied and she was ordered to pay $ 100 to the defendants under Fed. R. Civ. P. 11), and the two appeals from No. 98 C 8004 plus post-judgment motions practice in No. 98 C 6078. One suit has been turned into six, each characterized by needless contretemps.

We therefore direct Mann to show cause, if any she has, why she should not be ordered "to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." We limit this order to costs and expenses the defendants [*19] have incurred in the federal portion of the litigation. Mann may file her response within 14 days. Within the same time, defendants should file with the court an estimate of the total expenses they have incurred in both the district court and this court. This should include an estimate of the market value of the services provided by their in-house legal staffs. See *Central States Pension Fund v. Central Cartage Co.*, 76 F.3d 114 (7th Cir. 1996).

Appeal No. 99-1750 is dismissed as moot. On appeal No. 99-3595, the judgment of the district court is vacated, and the case is remanded with instructions to abstain. An order to show cause will be entered, returnable within 14 days.

Appendix B

United States Court of Appeals For the Seventh Circuit

Chicago, Illinois 60604

September 19, 2001

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

BEVERLY B. MANN, Plaintiff-Appellant, v. DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois,

and COOK COUNTY, ILLINOIS, Defendants-Appellees.

A-15

Nos. 99-1750 & 99-3595

Appeals from the United States District Court [*20] for the Northern District of Illinois, Eastern Division.

No. 98 C 8004

Harry D. Leinenweber, *Judge*.

Order

The response to our order to show cause spends a great deal of time expressing dissatisfaction with the rulings of both state and federal courts in this case, but it does very little to justify the filing of three federal lawsuits seeking review of decisions made in, or matters affecting, a products-liability case ongoing in state court. To the extent the response offers explanations (such as ignorance of *Pennzoil* and the Tax Injunction Act), these are not justifications. Counsel is obliged to research the law before filing suits. We therefore conclude, for reasons narrated in our order of August 31, 2001, that attorney Mann has multiplied the litigation unreasonably and vexatiously, and must personally pay the costs and legal fees that resulted.

The statement of costs and fees submitted by the defendants is modest. They seek compensation for only 28 hours of legal work, which covers proceedings in both the district court and this court. The hourly fee requested, $ 185, is appropriate to practice in Chicago.

Accordingly, and on the authority of 28 U.S.C. § 1927, [*21] Beverly Mann is ordered to pay $ 5,180.00 to the Office of the State's Attorney of Cook County. This amount must be paid within 14 days, and proof of payment must be filed with the

clerk of this court.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

A (a) - 1

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

March 6, 2003

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

Mr. Beverly B. Mann
7261 North Campbell Avenue
Chicago, IL 60645

Re: Beverly B. Mann
v. United States Court of Appeals
for the Seventh Circuit
Application No. 02A740

Dear Mr. Mann:

The application to file a writ of certiorari in excess of the page limitation in the above-entitled case has been presented to Justice Stevens, who on March 6, 2003, denied the application.

A corrected petition must be submitted within 60 days of the date of this letter or the petition will not be filed. Rule 14.5. Your $300.00 check and copy

of your petition will be retained in this office in anticipation of receipt of a properly prepared petition.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By

Gail B. Johnson
Assistant Clerk

UNITED STATES COURT OF APPEALS
For the Seventh Circuit Chicago, Illinois 60604
Jun. 18, 2002

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge Hon.
MICHAEL S. KANNE, Circuit Judge
Hon. ANN CLAIRE WILLIAMS, Circuit Judge

No. D-02-0005
In re: ATTORNEY BEVERLY B. MANN

The court orders attorney Beverly B. Mann to show cause within 10 days of the date of this order why she should not be disbarred for unprofessional conduct in prosecuting her appeals before this court. *See* Fed. R. App. P. 46(b)(1)(B). The clerk of this court shall accept Attorney Mann's response for filing in this matter.

D-1

UNITED STATES COURT OF APPEALS
For the Seventh Circuit Chicago, Illinois 60604
July 8, 2002

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge Hon.
MICHAEL S. KANNE, Circuit Judge
Hon. ANN CLAIRE WILLIAMS, Circuit Judge

No. D-02-0005
In re: ATTORNEY BEVERLY B. MANN

The following is before the court: RESPONSE TO RULE TO SHOW CAUSE, filed on June 28, 2002, by attorney Beverly B. Mann.

IT IS ORDERED that the Rule to Show Cause issued on June 18, 2002, is amended as set forth herein to include more specific information as requested by Ms. Mann. On September 19, 2001, the court ordered Beverly B. Mann to pay $5,180.00 to the Office of the State's Attorney of Cook County and file proof of payment with this court. However, Ms. Mann has failed to comply with this court's sanction order and the sanctions remain unpaid. Accordingly, the court orders attorney Beverly B. Mann to show cause within 10 days of the date of this order why she should remain a member of this court's bar with unpaid sanctions entered against her. *See* Fed. R. App. P. 46(b)(1)(B). The clerk of this court shall accept Attorney Mann's response for filing in this matter. No other filings will be accepted.

In the
United States Court of Appeals
For the Seventh Circuit

In re: Beverly B. Mann	)
	)
Nos. 99-1750 and 99-3595	)

(Corrected) Response to Rule to Show Cause

This court has issued a Rule to Show Cause why I should not be ordered "to satisfy personally the excess costs, expenses, and attorneys' fees incurred because of" the conduct the court alleges in its Rule 53 Order. Much of that conduct allegedly occurred in my underlying state-court products liability lawsuit, which stemmed from my use of the prescription drug Halcion, manufactured and marketed by The Upjohn Company, the defendant in that litigation.

But the Rule 53 Order's summary of procedural rulings and events in the underlying state-court lawsuit contains numerous significant factual inaccuracies. E.g., I did not file the initial products-liability lawsuit in federal district court; Upjohn removed it there. And the lawsuit was voluntarily dismissed in federal court upon motion by my attorney at the time, Paul R. O'Malley, for reasons utterly unrelated to discovery: O'Malley wanted to add a defendant, my prescribing physician, whose joinder would destroy federal diversity jurisdiction and allow the case to be heard in state court where he wanted it heard. The dismissal order itself explicitly provided for leave to refile in state court within 60 days adding the physician as a defendant.

Discovery was not a controversy at that early stage, much less the reason for the voluntary dismissal. Nor was I ever barred as a discovery sanction from presenting any

particular evidence, nor ever threatened by the court with a discovery sanction of any type.

I won't even bother to point out that under 28 U.S.C. §451, the term "court of the United States" as used in §1927 refers only to federal court, not to state court, and that §1927 doesn't authorize a federal court to impose sanctions based in part on events (even real ones) that occurred in state-court litigation. Not even when the federal court liquefies the two lawsuits into one for purposes of dismissing the federal case.

But I do recommend the issuance of a Miranda-type warning, something like: Every-thing you say or that someone says about you in state court can and will be used against you in a federal appeals-court of law. In the 7th U.S. Circuit appeals court, anyway.

Some of this court's inaccuracies about the underlying case are adopted or construed (and in two important respects misconstrued) from the state appellate court's still-unofficial opinion,[1] which itself contains numerous misrepresentations about the contents of certain court orders and about certain other procedural events. These are distortions so stark that they approach outright fabrication; e.g., certain motions that the opinion implies were granted actually were denied (and the reverse), and the opinion represents specific judicial

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[1] I filed an affidavit with the appellate court advising that I plan to file a petition with the Illinois Supreme Court pursuant to Supreme Court Rules 317 and 315. There are several points, but what entitles me to review as a matter of right under Rule 317 is that the appellate court failed to review the merits of the summary judgments entered on three counts well before the remaining counts were dismissed for want of prosecution, the propriety of which implicates due process and equal protection guarantees. I attach a copy of the 20-page Petition as Exhibit 1.

findings as directly contrary to actual statements in written memorandum orders.

An easily illustrated example is the opinion's statement that "[o]n January 28, defendant filed a motion to have facts deemed admitted based on plaintiff's failure to answer defendant's request for admissions." Indeed Upjohn did file such a motion, but the motion was denied because it was established that due to an error by a substitute secretary during Christmas week, Upjohn's lawyers didn't serve me with a copy of the request and I didn't know of it until I received notice of the motion; the substitute secretary to the attorney responsible for mailing copies of *several* documents that were filed on December 27 had failed to include in the envelope a copy of the request for admissions.

The envelope did include a summary judgment motion, to which I responded *before* Upjohn filed its motion on the request for admissions, and a large set of interrogatories (Upjohn's eighth set, I believe, after several were stricken upon my motion), to which I also had responded – by answering some of them and *successfully* objecting to others – before Upjohn filed its admissions-motion. After Upjohn's admissions-motion was denied, I promptly filed a blanket objection to the entire request. The objection was *sustained* and the request, like several earlier ones, was stricken.

The incident was irrelevant to the appeal and was included in the opinion solely to mislead that the motion was granted rather than denied.[2] *Both* parties in that lawsuit timely

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[2] This court plays a similar game, e.g., in its throwaway reference to the $100 sanction Judge Leinenweber imposed, the unelaborated mention of which misleads that the sanction concerned the substance of the lawsuit and that it was imposed after the issuance of the Rule's required formal notice and opportunity to respond in writing, and that it was justified. But I had *appealed*

objected to various discovery demands. Neither party's discovery objections were ever ruled frivolous. In 1996 and '97, I moved *successfully* to strike one after another after another set of interrogatories/requests for admissions – each set containing approximately 200 interrogatories and a very substantial number of generic requests for admissions, which Upjohn served routinely in Halcion litigation. My *sustained* objections: that these discovery requests were redundant of earlier-completed discovery, that they were vexatious, and that they were served in violation of an Illinois Supreme Court Rule limiting the number of interrogatories to 35 without leave of court. I also moved *successfully* to quash several subpoenas (including one seeking a copy of my law school records, which I learned of only when an attorney for the University phoned me and asked whether I wanted the school to contest the subpoena on my behalf and on the school's.)[3]

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from the sanction order, which (if only in theory) barred this court from presuming without examination that it was appropriately issued.

[3] Another of the subpoenas was for the deposition of my sister's former husband, a gynecologist who after graduating from Northwestern University Medical School in 1969 moved with my sister to Denver, where he completed his medical training. He has never practiced medicine anywhere but Denver, and I have never lived in Colorado, yet Upjohn said it needed his deposition because I might have seen him as a patient. I had not claimed gynecological injury from my use of Halcion, nor do I have a medical history of gynecological problems. My sister and her former husband, incidentally, were divorced in 1975, and she and her current husband have lived in Seattle since 1987. Suffice it to say I easily had her ex-husband's subpoena quashed – as I did a deposition subpoena served on her current husband, who has never lived in Chicago, and a deposition subpoena served on my other sister's husband, who has lived (with my sister) in Houston since 1983.

As for the subpoena for my law school records, the notice of it was sent to O'Malley's office, but O'Malley didn't know about it because (incredibly, in my view) neither he nor his associate

Upjohn wanted to depose everyone I had ever known (well, there *were* a few of my former kindergarten classmates whose names did not appear on their deposition list). And in August 1997, I moved successfully to quash a mass effort by Upjohn to secure via *written* "evidence deposition" the testimony of virtually every physician I had ever seen; it wasn't quite clear how, exactly, I was to attend the *written* evidence depositions.[4]

The federal judge's voluntary-dismissal order had required that I respond within a specified time (14 days, I think) to a lengthy set of interrogatories Upjohn had served upon me shortly before the dismissal. I happened to be out of town at the time, and O'Malley faxed me the interrogatories, which I answered and then Fed Ex'd back to him. (The notary's stamp on my answers read "King County, WA.") Yet no sooner was the lawsuit refiled than did Upjohn's lawyers serve me with another lengthy set of interrogatories. O'Malley objected on the grounds that they were almost entirely duplicative of the ones I already had answered. The objection was not sustained, I was ordered to answer the

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routinely reviewed subpoena notices; the office receptionist was instructed simply to place those notices in the appropriate case file upon their receipt. It was this incident, in June 1996, that caused my already strained relationship with him to sever.

[4] "Evidence deposition" is a term of art, and something of a misnomer, in Illinois law. It differs from a discovery deposition (a *non*-evidence deposition?) in that its supposedly sole purpose is as verbatim trial testimony and, with limited exceptions, objections not made during an evidence deposition are deemed waived at trial. Discovery depositions, by contrast, under Illinois law cannot be used as verbatim trial testimony. Evidence depositions are allowed only by court order, the grounds for which must be the anticipated unavailability of the witness at trial, a circumstance that Upjohn did not (and *could* not) claim regarding even a single one of the targeted deponents. And for obvious reasons, there is no rule in Illinois permitting *written* evidence depositions.

interrogatories, and I did. No sanction of any type was issued then, or – I reemphasize – at any other time in that litigation.

No, most of the controversy in that litigation – and the one that ultimately caused me to request that the case be dismissed for want of prosecution – concerned not any failure to provide information in discovery but my failure to *retain paid opinion witnesses*, which I maintained I did not need in order to prove my case. The controversy, in other words, was not about my failure to *disclose* witness's identities or to produce documents but about my failure to *pay* opinion witnesses.

That was it, pure and simple. And should this court doubt this, I am providing in an accompanying appendix a copy of the Table of Contents and the Points and Authorities table from my opening brief in that appeal. And I can provide on disk or in hard copy all four briefs filed in that appeal, if this court would like.

The *paid*-opinion-witnesses issue also was the subject – the *only* subject – of the petition for temporary restraining order I filed in federal court in October, 1997, that so enrages this court.

It also was a central part of my appeal, although as is so typical of appellate opinions the state-court opinion doesn't mention it. Instead it cites a litany of allegations and presents them inaccurately as sustained by the trial court, apparently on the legal premise that any accusation a defendant makes against a pro se plaintiff is by definition accurate, at least when removed from its context (as most of the enumerated items are). But almost none of the items was addressed in the briefs to that court, and since the court knew of the allegations it also knew (or should have known) of my responses to them, and of the trial court's determinations concerning the allegations, and of the reasons for the trial court's determinations, none of which buttressed the opinion's premise.

For example, the court utterly misrepresented the nature and significance of one ruling by writing, "On February 19, the trial court granted defendant's motion to bar fact witnesses." The intended inference, of course, was that *all* my fact witnesses were stricken. But that is nonsense. The motion was a typical pretrial motion seeking to bar certain named trial witnesses. I no longer recall the details, but *by no means all* of my fact witnesses were stricken; I think only two of them were. And I had some of Upjohn's witnesses stricken, too.

In *most* litigation about to proceed to trial, names of witnesses are stricken on pretrial motion. So, the hell, what? This wasn't an issue on appeal and therefore was not addressed in the briefs. The court mentioned the February 19 order because it wanted to mislead; an honest recounting of it, as with an honest recounting of so much else in that case, would have been pointless or, worse, self-defeating.

That court perverts into parody the legal construct that appellate courts can affirm upon any grounds found in the record. As does this court, it redefines the phrase "grounds found in the record" as any statement that appears in any document in the record, however unsupported and even if overtly rejected by the trial court. It designates the defendant's lawyers as factfinder, as the lawsuit's diarist, as the font of true observation, and whatever they write may properly be adopted, unexamined, by the court.

And any sentence in a court order can be extracted, in or out of its context, and adopted unscrutinized and without elaboration, as needed. This court knows the routine: The trial court entered summary judgment/a sanction order/a discovery order/a … order; therefore the summary judgment/the sanction order/the discovery order/the … order is affirmed."

Or: The trial court entered summary judgment/a sanction order/a discovery order/a ... order; therefore an order that *piggybacked on* the summary judgment/the sanction order/the discovery order/the ... order is affirmed.

No need to examine the truth of the allegation or the propriety of the foundational order even when it is being appealed.

I call it a house-of-cards, although in criminal-law lingo I think it's known as a Ponzi scheme.

Most astonishing about the state-court opinion is the extraordinary degree to which that court freelanced through the huge (and expensively prepared) court record, recasting utter irrelevancies in a starkly false light.[5] I address some additional instances in detail in Exhibit 1, attached.

But of more immediate importance is that *this* appeals court in its Rule 53 Order makes several key errors, particularly concerning Illinois law regarding: (1) the *appealability* of two orders (which this court erroneously calls judgments) entered in the state-court case respectively on September 28 and November 19, 1998, on the file-preparation-fee matter; (2) whether under Illinois law my fees-challenge lawsuit and the underlying products-liability one really are the same case and therefore a replay of *Pennzoil v. Texaco*; (3) whether Illinois appellate courts have the authority to waive or reduce the file-preparation fee; (4) the effect of a denial by the Illinois Supreme Court of a Rule 381 petition, and the resulting effect on the issue of comity; and

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[5] I include in the appendix my two three-page motions concerning the attorney-eye-surgery incident that that court calls inexcusable. This court can, if it wishes, read the motions and draw its own conclusion.

(5) the constitutional structure in Illinois for *funding* the county and appellate courts.

This court also misconstrues the nature of my federal constitutional challenge. I think that in part this is because the court misapprehends Illinois' constitutionally-determined funding structure for the courts; the graduated ceilingless fees are paid *not* to the state, although it is the state *alone* that funds the trial and appellate court systems, but to the counties, which fund *no part* of the court systems. And in part it is because no judge or court-staff member read my briefs – which, incidentally, did address the funding-structure question. (Had the Rule 53 Order's author read my briefs he would know, for example, that I did pay the $1,635 record-preparation fee – not to the state but to the county, as per the law I was challenging. Although the state alone funds the courts it plays no role whatsoever in the collection *or use* of the fees, a primary basis for my lawsuit. So much for this court's contention that the Cook County State's Attorney's office failed to assert certain defenses because it did not have the interests of the *state* at heart; the state *had* no interest at heart, but the county did.)

Instead, a law clerk was assigned to summarize my arguments as filtered through the *appellees'* briefs, as is standard procedure for appellate review, or faux appellate review, in pro se civil lawsuits. A foolproof strategy for an appellee contesting a pro se appeal is to not even mention the appellant's strongest arguments; it works every time.

Or so, as a frequent filer, is appears to me.

I. The Fee-Challenge Lawsuit

This court misunderstands the essential premise of my federal lawsuit, which is that a graduated, ceilingless appellate fee determined by the size of the court record irrespective of

the relevance of most of the record to the issues being appealed, and paid *not* to the state (which *alone* funds the county court systems in Illinois) but instead to the county itself (which pays *nothing* toward the cost of running the court system), irrationally requires appellants whose court files are large to pay unduly to support the *county* government albeit *not* the state government and therefore *not* the trial or appellate court system.

A. Under Illinois law, the September 28 and November 19, 1998, state-court orders on the fee challenge were not appealable.

This court derides my claim that the September 28 and November 19, 1998, orders issued by Cook County Circuit Judge Susan Zwick were not final orders with res judicata effect. Deride though it might, this court presumes incorrectly; under Illinois law those orders were not appealable and they had no legal effect other than to bar the fee-challenge from being litigated as part of the products-liability lawsuit.

This court attributes to Judge Zwick its own view, which ridicules my fee-challenge motions as an inappropriate effort to convert the products-liability case into some new constitutional claim. Ridicule though it does, the court misconstrues the nature of Judge Zwick's orders as determined by Illinois law. Zwick found my motions inappropriate not because they asserted a constitutional challenge to the record-preparation fee for appeal in the products-liability lawsuit but because under Illinois law the constitutional challenge could be brought *only in a separate lawsuit*. And under Illinois law, as long as there exists the option to file a separate lawsuit, such orders *are not appealable*. See, e.g., by analogy, *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, N.E.2d 338 (1998), holding that orders denying motions to vacate

dismissals for want of prosecution are not appealable as long as the plaintiff could refile within one year under 735 ILCS 5/13-217.

The motion I presented at the September 28 hearing was to compel the release of the already-prepared record on appeal. It invoked specific provisions of the Illinois state constitution but not the United States Constitution. Judge Zwick expressly *declined to consider* the constitutional challenge to the statutory subsection at issue, 705 ILCS 105/27.2a(k)(4). *She said I would have to file another lawsuit in order to challenge the constitutionality of the fees statute.* She also said she knew of no statute or Supreme Court Rule other than Rule 298 that would allow her to compel the release of the record without the payment of the preparation fee. As per normal procedure there, I drafted the order. I wrote that the motion was denied.

At the November 20 hearing, the motion I presented to Zwick requested the severance of portions of the record for preparation for appeal. The motion sought alternatively a finding that the fees statute violates three provisions of the Illinois state constitution. That motion, like the earlier one, included no federal constitutional claim.

But it did include a section titled "The Procedural and Jurisdictional Basis for this Motion," which read:

> As Mann understands it, there are essentially two methods by which the constitutionality of a statute may be challenged. Anyone with legal standing to challenge the statute (i.e., anyone in reasonably imminent danger of suffering harm because of the statute) may do so by filing an independent proceeding with a court; e.g., a petition for mandamus or prohibition. If the statute pertains to litigation, persons who are litigants in a proceeding effected by the statute may also file a motion seeking relief

from compliance with the statute via a finding that the statute is unconstitutional.

It was the latter method that was employed recently to obtain a court ruling finding particular sections of the Illinois Tort immunity Act, and ultimately the Act itself, unconstitutional. To wit: *Kunkel v. Walton, et al.*, No. 81176 (Nov. 20, 1997); *Best v. Taylor Machine Works*, Nos. 81890, 81891, 81892, 81893 cons. (Dec. 18, 1997); *Hettinger v. Krah*, 95 L 601(not a Cook County case)....

.... In *Kunkel, supra.*, and *Hettinger, supra.*, for example, the plaintiff filed a personal injury lawsuit and then challenged the section of the Tort Reform Act requiring the plaintiff to allow the defendant indiscriminate access to the respective plaintiff's lifetime medical records without regard to their relevance to their lawsuit, upon sanction of dismissal of the lawsuit. The plaintiffs each challenged the constitutionality of the statute, not collaterally in a different court proceeding but directly in motions brought within their respective underlying lawsuits.

The ultimate relief they sought was the ability to proceed with their lawsuits without complying with the statutory mandate that they waive all rights to medical privacy. The avenue by which they obtained such relief: a finding by the court (the circuit court, affirmed on appeal) that the statute at issue violated Article I, Section 2, of the Constitution of the State of Illinois. The court declared the statute unconstitutional, thus granting them the ultimate relief they sought; they were allowed to proceed with their lawsuits without indiscriminately waiving their medical privacy rights.

In *Kunkel* and *Hettinger*, the plaintiffs could obtain the ultimate relief they sought simply by a single action of the court. Once the court found the challenged statute

unconstitutional, the court allowed the lawsuits to proceed without the statutorily mandated waivers.

The judge *agreed* with my premise. She read aloud a paragraph from an Illinois Supreme Court opinion (I think it was from *Kunkel*) which said the trial judge has the discretionary authority to exercise jurisdiction to hear constitutional issues collateral to the litigation. She said she was exercising her discretionary authority to decline to exercise jurisdiction to hear the constitutional challenge, partly because the County was not a defendant in the products-liability case. (Their counsel did appear at the hearing, but only because I had requested her presence.) Again the judge told me to "file another motion." She also said I had misconstrued her earlier ruling when I drafted the September 28 order: She had not denied the constitutional challenge; she simply had declined to exercise jurisdiction to hear it. And she denied my request for severance of portions of the record. She dictated the precise language for the order, which reads:

1. The court states that it is reiterating that it is declining to accept jurisdiction to hear the constitutional challenge because the constitutional challenge was not a part of, and is collateral to, the underlying products liability lawsuit.
2. The motion to remove documents from the record is denied on the basis that the court lacks the authority to allow it.

Her two orders, as they concerned the constitutional challenges, were similar in nature to ones that sever some counts in a complaint or that deny a discretionary joinder motion, orders that are non-appealable, at least under Illinois law, as long as no substantive rights are affected. Orders that, even if appealable, *are not judgments* and do not bar the

litigation of the issues in a separate lawsuit if that is the choice of the litigant.

Judge Zwick neither intentionally nor inadvertently precluded my right to litigate the issue. She just denied me the forum of the products liability case in which to litigate it. By reading from (I think) *Kunkel*, she said she *could* have exercised jurisdiction to hear the matter but that she *chose* not to. She never suggested that she thought I was making an inappropriate effort to convert the products-liability case into some new constitutional claim. She said I *had* a constitutional claim, *stemming* from my appeal in the products-liability lawsuit, but that she would not hear the claim as *part* of the products-liability lawsuit although she *could* if she chose.

This court, citing *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), writes, "This suit could have been dismissed on preclusion grounds; a disappointed litigant must appeal, rather than file another suit, even if developments after entry of the first judgment show that the decision was incorrect."

But under Illinois law *there was no judgment* – none whatsoever. There was only an order declining to accept jurisdiction to hear the fee-challenge as part of the products-liability case. This court's citation to *Moitie* follows immediately the court's reference to my Rule 60(b) motion in 98 C 6078, and I'm not sure whether the *Moitie* citation is intended as a res judicata finding on the dismissal of 98 C 6078 as well as on Judge Zwick's orders. But 98 C 6078 was dismissed not on the merits but on jurisdictional grounds that no longer existed by the time I filed 98 C 8004, and *Moitie* finds a res judicata bar only to the refiling of a claim already decided on its substantive merits. *Moitie* barred only my relitigation of the jurisdictional issue on which the district judge based the judgment in 98 C 6078, and I was not trying to relitigate that issue, which no longer was relevant.

This court's Rule 53 Order puzzles me with its citation to *Mazanec v. North Judson-San Pierre School Corp.*, 763 F.2d 845 (7th Cir. 1985), to support its sneer that "federal courts are entitled to abstain on their own ... to protect themselves from impositions of the kind that Mann has perpetrated." Nearly every paragraph of *Mazanec* undermines this court's premise.

For example, *Mazanec* treated as a threshold question the appealability of an abstention order in the jurisdiction where it was issued. And after noting that in this circuit (where the abstention order was issued in that case), orders granting abstention are appealable as final orders and orders denying abstention before final judgment are not appealable, that opinion commented that the latter are no more final than are orders denying motions to dismiss under Fed. R. Civ. P. 12(b)(6).

In my case, Zwick's abstention orders were no more final than was the order at issue *S.C. Vaughan Oil Co.* I know of no Illinois legal authority that suggests otherwise.

If this court does, it should cite to me that authority and allow me to address it before I am sanctioned for litigating the fees issue in federal court. I did discuss in the federal litigation the question of issue-preclusion, in the documents I filed with the district court (see the first paragraph of Section C below) and in my appellate briefs.

I did not ignore the issue; this court ignored what I wrote about it.

This court chides the State's Attorney's office and Judge Leinenweber as well as me for our collective failure to see an issue-preclusion bar. But the State's Attorney's office is familiar with "the preclusive effect of an Illinois state court judgment" and with what "that state's res judicata

requirements" are, see *People ex rel. Burris v. Progressive Land Developers, Inc.*, 151 Ill. 2d 285 (1992), as is Judge Leinenweber, a former Illinois state legislator and chair of a legislative committee that drafted Illinois' completely revamped civil practice statutory scheme in 1982. As was I in the fall of 1998, when I litigated the matter.

Which is why none of us found Judge Zwick's September 28 order as amended by her November 19 order, nor her November 19 order itself, a judgment with res judicata effect under Illinois law. Or under Illinois law a judgment at all.

B. This court holds inexplicably that Art. III standing to challenge the constitutionality of a state court-fees statute itself bars a federal constitutional challenge in federal court, an untenable and circular legal position.

This court also questions Judge Leinenweber' s belief that I was challenging the constitutionality of the fee statute itself rather than the state judicial system's application of the statute to my appeal. But this court appears to base its conclusion on this point solely upon my Art. III standing to challenge the fee statute, an untenable and circular legal position.

In my brief in 99-3595 at p. 4, I wrote, "The statute applies to all types of cases, including criminal, dissolution of marriage, child custody, adoption and probate, as well as to personnel injury and products liability lawsuits." I had written the same in my brief in 99-1750 and in most of the documents I filed with the district court.

And in my brief in 99-3595 at pp. 30-31, I wrote in a section titled "The Public Has a Strong Interest in Providing Access to Appellate Review Irrespective of a Party's Financial Ability to Pay a Four-Figure Tax":

The public has a substantial interest in the ultimate determination of the constitutional issues presented in this lawsuit. As Mann noted above, the fees schedule at issue applies in every type of litigation in Illinois state court, civil and criminal. Mann does not challenge the district court's premise that litigants must be prepared to pay the reasonable expenses of litigation. She does challenge the constitutionality of a statute that requires litigants to pay litigation expenses that are neither reasonable nor inherently necessary but, rather, artificially erected by the government.

Civil litigation is almost always very expensive. Hourly attorneys' fees have a market rate set mainly by large corporate clients and are virtually always in the three-figure-per-hour range. Court reporter fees also are substantial; court reporters attend approximately two years of school to gain the special skills that enable them to perform their service and then must purchase the very expensive equipment and (these days) computer software necessary to their job, and their fees reflect this. These are non-artificial (if not always reasonable) expenses of litigation.

But the district court's premise is preposterous that this justifies the government's assessment of the artificial fees at issue in this lawsuit.

Mann also believes that the fees schedule creates and inherent conflict of interest for attorneys representing clients upon a contingent-fee arrangement. In such circumstances, the attorney usually has agreed to pay the expenses of the litigation during its pendency and to deduct those expenses from the eventual monetary reward, if any. It seems likely to Mann that the prospect of a prerequisite court-fees payment of perhaps thousands of dollars may

impact upon the advice the attorney gives the client regarding the advisability of appeal.

Having silently conceded the inevitability of a chasm between the actual stated grounds in a pro se civil appeal and what (after translation by a law clerk) passes as the court's summary of it, this type of thing no longer jolts me; I expect it of the court, and the court doesn't disappoint.

But the threat or imposition of sanctions (and certainly of sever ones, as this court plans to impose on me) are another matter entirely. Particularly so given that this court apparently bases its sanctions assessment partly on my standing to challenge the fee statute – not on my lack of it but on my possession of it.

The court says (as I understand it) that standing to challenge the fee statute operates as a nearly irrebuttable presumption that the constitutional challenge concerns the statute's application only to that plaintiff's underlying case. Only if the plaintiff must pay the fee in order to appeal from an already issued judgment does she have standing under Art. III to challenge the fee's constitutionality. And because she is challenging the fee's constitutionality by virtue of the assessment of the fee in her appeal, she is presumed to be challenging its constitutionality only as applied in her case.

The presumption can be rebutted (presumably) only by filing a petition for class certification. But I lacked the funding and the legal expertise to litigate a class action. So according to this court I was not challenging the statute's constitutionality but only its constitutionality in my situation.

No matter that a finding of unconstitutionality in my situation effectively would have stricken the statute *in all situations*, just as occurred in *Kunkel* and *Taylor Machine Works*. It was not the nature of my claim but my failure to

seek class status for it that bars my access to federal court and that subjects me to sanctions for proceeding with the matter in federal court.

How absurd.

The fee statute is neither vague nor susceptible of varying interpretations depending upon the circumstances – even less so, in fact, than was the statute in *Mazanec*. If the fee statute was unconstitutional in my case it was unconstitutional – period. Which is exactly what I argued to the district court and to this court, e.g., at pp. 26-27 of my brief in 99-3595, where I wrote:

> Because Cook County reaps a substantial monetary windfall as a result of §105/27.2a(k)(4), the subsection is, by definition, a general-revenue tax upon what is a very small subgroup of county residents: appellants in cases in which there is a large court record. No legitimate governmental purpose exists for the levy of this general revenue tax.
>
> For Mann, this statute has required her to pay approximately $1,400 (the amount of her payment beyond the approximate cost to the county of the preparation of her court record for appeal) to support the general expenses of county government. There is no connection between the requirement of this payment and any legitimate justification for it.
>
> The basis for this constitutional challenge obviously does not rest upon the financial resources of the appellant; it is equally available to any appellant whose court record is large, irrespective of the litigant's net worth, whether a homeless person living on the curbside of lower Wacker Drive, or Beverly Mann, or Abra Rockefeller Prentice.

Nor, incidentally, did I arbitrarily select the $150 that the court says I was willing to pay, but no more. The $150 amount was selected for me; it's the initial amount that pursuant to another subsection of the statute must be paid. The subsection I was challenging kicks in as a per-page ceilingless fee if the court file is larger than 200 pages. I challenged that subsection but not the one that assesses the $150 fee. Had the latter subsection assessed a $250 fee or $500 fee or even a $750 fee, I'd have paid it. But no more.

C. Under Illinois law, my federal lawsuit and the underlying one are not the same case and therefore not a replay of *Pennzoil v. Texaco*.

In my amended complaint and mandamus petition, I quoted the following from *Retired Chicago Police Assn. v. City of Chicago*, 7 F.3d 584 (7th Cir. 1993):

> To assess the preclusive effect of an Illinois state court judgment, therefore, we must apply that state's res judicata requirements. Under Illinois law, an action is barred by res judicata when there exists: "(1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of cause of action; and (3) an identity of parties or their privies." *People ex rel. Burris v. Progressive Land Developers, Inc.*, 151 Ill. 2d 285, 602 N.E.2d 820, 825, 176 Ill. Dec. 874 (Ill. 1992); see also *Welch v. Johnson*, 907 F.2d 714, 720 (7th Cir. 1990) (stating same).

Irrespective of whether this court agrees with me that Judge Zwick's September 28 and November 19 orders were similar to ones that sever some counts in a complaint or that deny a discretionary joinder motion and that they therefore did not bar litigation of the fees issue in a separate lawsuit, and setting aside the matter of identity of causes of action between the products-liability lawsuit and the fees-challenge lawsuit, it is

indisputable that there existed no identity of parties or their privies in the federal and state-court actions.

Nor does this present a merely technical, and therefore perhaps insufficient, distinction between my cases and *Pennzoil v. Texaco*, the case this court finds determinative. The bond at issue in *Pennzoil*, and the statute that required its payment, were solely for the benefit of Pennzoil, not for the benefit of the government entity to which the bond would be paid. The bond money represented the monetary judgment that was to be appealed, and the government entity would hold the bond money in escrow *solely for the benefit of Pennzoil*, which had won the judgment.

It is no artifice to note that the petitioner to the Supreme Court in *Pennzoil* was, well, Pennzoil, not the government entity to which the bond was to be paid. The government entity was neither a party nor a party-in-interest to that proceeding; it had no financial or other interest in the outcome of the Supreme Court case. Indeed the *Pennzoil* opinion begins:

> The principal issue in this case is whether a federal district court lawfully may enjoin a plaintiff who has prevailed in a trial in state court *from executing the judgment in its favor* pending appeal of that judgment to a state appellate court.

The issue in *Pennzoil* concerned the procedure for executing the monetary judgment awarded *to Pennzoil* at trial, specifically whether the procedure for executing the judgment implicated a federal constitutional right. But in my fees-challenge case the real party-in-interest was not Upjohn, the appellee in the products-liability case, but Cook County, the government entity that not only would collect the fee but would *use* the fee. And *did* use the fee; the county has not paid and will not be paying Upjohn the $1,635 I paid to it for the preparation of the court record.

So how is this a replay of *Pennzoil*? And, more to the immediate point, why should I be sanctioned in light of *Pennzoil* for filing the federal lawsuit? Other than that this court likes to sanction people for the sake of sanctioning people, that is.

As for Judge Zwick, she was right (for once) in ruling against me. (She was right *all* the time when she ruled *for* me.) I had relied upon *Kunkel*, *Taylor Machine Works* and *Hettinger* for my proposition that she did have jurisdiction to hear the fees-challenge. But the statutes at issue in those cases (particularly in *Kunkel* and *Hettinger*) were for the sole benefit of private civil defendants in such cases, not for the benefit of the state or other government entity. And as the names of those cases denote, just as the name of *Pennzoil v. Texaco* denotes, it was not the government but the defendants in the tort actions who were the parties in interest as well as the parties in name.

Although Zwick said she had the option to accept jurisdiction on the fees challenge, and although at the time I certainly agreed with her interpretation of the law on that, I no longer think she even had the option to hear it, given that it was the county and not Upjohn whose interest was at issue in the fees matter. I think the appropriate analysis would be analogous to that in considering discretionary-joinder motions. And at least unless the county was being joined as a party, a joinder motion would have to have been denied.

D. Illinois appellate courts have no authority to waive or reduce the file-preparation fee

Although this court says otherwise, there is no Illinois rule that enables an appellate court to waive or reduce the file-preparation fee as this court claims. I, at least, know of none, and that is not for lack of trying. Unable to find one myself, I inquired of the deputy chief clerk at the appellate court clerk's

office (Steven Ravid, who this year became that court's clerk) and was told no such procedure exists. As this court notes, Illinois Supreme Court Rule 298 provides for petitions to be presented to the trial court and also strictly limits eligibility for that relief. Another Rule permits the severance of some documents from the remainder of the record to allow their preparation for appeal, but it requires the discretionary approval of the trial judge or agreement of the appellee. I presented such a motion to the trial judge but Upjohn contested it successfully on the grounds that neither of its appellate attorneys had been involved in the case at the trial-court stage and they would need the entire record when drafting their briefs (these were cross-appeals).[6] The wording of the Rule suggests that such a motion could be presented also to the appellate court, but when I told Upjohn's local appellate counsel – Thomas Fegan, a longtime Illinois appellate specialist – that I planned to file one he said the appellate court could not entertain motions under that Rule.

Fegan is the author of a book on Illinois appellate procedure, and I checked his book's discussion of the Rule (I don't recall which Rule it was) to verify that he thought this. The book confirmed it and cited supporting case authority.

E. An exhaustion-of-state-constitutional-remedies prerequisite would divest federal courts of original jurisdiction to hear any federal due process or equal protection claim against any government in Illinois, or at least would divest it of original jurisdiction to hear any such challenge to an Illinois statute.

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[6] This sounds like a transparent excuse to ratchet up the cost to me of the appeal, but it was not. At virtually the same time, Upjohn's lawyers provided me with copies of transcripts of about 25 hearings at $.20 per page, the same rate they charge their clients, saving me more than $2,000 in court-reporter fees.

Article I, Section 2, of the Illinois state constitution mirrors the Fourteenth Amendment's due process and equal protection clauses. It was the primary state-constitutional provision I asserted in the motions Judge Zwick declined to hear, and in my Rule 381 petition that the Illinois Supreme Court declined to hear. It reads:

> No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

If the existence of that or any other constitutional provision requires federal court abstention in my fees-challenge lawsuit, then they would do the same in other cases challenging Illinois statutes. *But they don't.*

This court's opinion in *Club Misty, Inc. v. Laski*, 208 F.3d 615 (7th Cir. 2000), begins with: "Two licensed taverns in Chicago appeal from the district court's dismissal of their suit to enjoin an Illinois state statute pursuant to which the plaintiffs would have lost their licenses had they not been granted preliminary relief that continues on appeal. The statute, 235 ILCS 5/9-1 et seq., is challenged both as depriving the plaintiffs of their property without due process of law and as a bill of attainder." It ends with: "So the issue 'is not too much delegation, but delegation to the wrong body: delegation of judicial decision-making, for example, to people who are not judges.' [Citations omitted.] That is what Illinois has done and what the due process clause prohibits."

No fear expressed there of unwarranted determination of federal constitutional questions. Nor in *Kendall-Jackson Winery, Ltd. v. Branson*, 212 F.3d 995 (7th Cir. 2000).

The federal constitutionality of Illinois statutes are challenged in federal district court just as the federal constitutionality of other states' states are challenged in

federal district court even when those states' constitutions have provisions that mirror the federal constitutional provision cited. And they proceed through federal district-court and appellate resolution on their merits.

While I was litigating my fee challenge in federal district court, the U.S. Supreme Court issued its opinion in *Saenz v. Roe*, 526 U.S. 489 (1999), in which it affirmed a ruling by the 9th U.S. Circuit Court of Appeals that struck a California welfare-benefits statute as violative of several clauses of the Fourteenth Amendment, including the equal protection clause. The district court in *Saenz*, like the 9th Circuit, had ruled on the merits of the federal constitutional issues, including the equal protection issue.

The Supreme Court in its opinion in *Saenz* did not mention a state-constitutional-grounds exhaustion requirement, and I don't know whether California's constitution has a provision similar to the Fourteenth Amendment's equal protection clause and to the Illinois constitution's Art. I, sec. 2. But I do know this: that on the date that the Supreme Court decided *Saenz*, a virtually identical lawsuit then on appeal before *this* court was based on an Illinois statute indistinguishable from the one in *Saenz*, and that the appellant was not the plaintiff but the state of Illinois. The district court had found that the statute violated the Fourteenth Amendment – this notwithstanding the existence of the state constitution's Art. I, sec. 2, and that the plaintiff was complaining about the effect of the statute on ***her***. See *Hicks v. Peters*, 98-3696 (7th Cir.).

I quoted from *Saenz* to the district court and in my briefs to this court (in 99-3595 at p. 29, in 99-1750 at pp. 36-37). The law clerk assigned to this appeal must have missed it.

This court writes in its Rule 53 Order that it examined the briefs and record in my appeals and concluded that oral argument was unnecessary. But, with the exceptions only of

the issue-preclusion question and the state-court-funding-structure matter, both of which I discussed above, none of the issues on which it based its decision and its sanction was briefed to this court, nor even argued to the district court. I requested oral argument – although I admit I really didn't want it. But at least at oral argument I would have learned that my appeals would be determined in a vacuum, upon cascading unscrutinized presumptions that I had no reason to foresee. I could have – and would have – requested leave to file a supplemental brief addressing them, albeit one that (like the others) no one would have read anyway.

I'm writing that brief now, instead of meeting deadlines on a variety of other matters, only some of them related to my avocation as a frequent filer. But I'm not sure why. I've already lost my appeals, and this court already has decided to sanction me. It makes no difference what I write here.

Just as it made no difference what I wrote in my formal briefs. I could have written anything. I could have confessed to murder (and did, at p. 19 in 99-3595). I could have recited nursery rhymes (pp. 7-9 in 99-1750). I could have excerpted pages from the phone book (pp. 10-18 in 99-3595). I could have divulged a purloined nuclear secret (p. 37 in 99-1750). It was all the same. As it will be again.

F. A petition pursuant to Illinois Supreme Court Rule 381 gives Illinois the "first crack" at the issue and therefore satisfies the *Pullman*-doctrine prerequisite.

Much of this court's Rule 53 Order reads to me like a shell game. It skewers me for bringing the fees-challenge to federal court instead of presenting it to the Illinois courts. But it also disparages me for petitioning the Illinois Supreme Court to hear the case pursuant to a Supreme Court Rule explicitly designed to provide quick adjudication of such issues. And it

notes gleefully that the Supreme Court promptly denied my petition to consider the issue, yet it orders the district court to abstain from the matter because, it says, I didn't bring the matter to the Illinois courts.

This court cites *Mazanec* to support sanctions against me, but *Mazanec* says, "no useful purpose would be served by abstaining in this case. The main purpose of the *Pullman* doctrine is to avoid, if possible, declaring a state statute unconstitutional, by giving the state courts a chance to interpret it narrowly. [Citations omitted.]" *Mazanec* also says "there are two requirements for abstaining under *Pullman*: some risk that the statute will be found unconstitutional unless narrowed; some reasonable chance that it can be narrowed through interpretation." But apart from this court's rumination about the former, the latter chance is nonexistent; the statute sets the fee, a ceilingless fee of $.25 per page.

This court says I wasn't challenging the fee as unconstitutional for anyone but me. But (even aside from the portions of my brief quoted above that do exactly that in unequivocal terms) the court's assertion is a logical impossibility.

I had never heard of the Tax Injunction Act. But apparently neither had the State's Attorney's Office nor had the district judge. And *Mazanec*, which this court cites in support of sanctions, ends with this:

> At the risk of supererogation, we add a final reason against abstention: the state did not ask for it until the end of the trial. We mentioned this point earlier in connection with delay; but it is also an independent argument against abstention. It is true that abstention can be ordered even if neither party requests it at any stage of the proceedings, [citations omitted] – and this may seem surprising: if the state does not want the protection that the doctrine affords

> it, why should the federal court extend the doctrine affords it, why would the federal court extend that protection to the state anyway? The answer is that "the state" is not an individual, but a collectivity. State attorneys general (who usually are elected officials, rather than appointees (who usually are elected officials, rather than appointees of the governor) may not have the same interests as other organs of state government; nor may local officials; and federal court should not get involved unnecessarily in what may be intramural struggles of state government even if invited to do so by one of the contenders. But if the responsible state officials are willing to litigate the case in federal court, that court does not have to force it back into state court. [Citations omitted.] These state officials were willing.

My Rule 381 petition – this court's derision of it notwithstanding – accommodated the need for state comity and satisfied the requirement of the Tax Injunction Act.

And when contending parties invoke the process of the federal courts, it becomes the unsought responsibility of those courts to resolve the federal and constitutional issues the judicial system has been forced to confront. See *Bush v. Gore*, 121 S. Ct. 525 (2000). This court shirked its responsibility to consider my fees challenge, and veils that truth under a pious sanction order.

Conclusion

Much of this court's Rule to Show Cause relies upon the factually erroneous statement in the state-court appellate opinion that the trial court had issued several sanctions orders were issued against me. On September 18, I filed with the Illinois Supreme Court an Appeal as of Right and, alternatively, a Petition for Leave to Appeal, in which I address that issue at various points in her Petition to the

Illinois Supreme Court, but particularly in several paragraphs on p. 16, one of which reads:

> Illinois Supreme Court Rule 219 is titled "Consequences of Refusal to Comply with Rules or Order Relating to Discovery or Pretrial Conferences." Sec. (c) requires that "[w]here a sanction is imposed ... the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order." No such sanctions order was entered in this litigation.

I attach to this Response as Exhibit 1 a copy of that 20-page Petition. The Petition addresses all of the matters this court raises about the manner in which I litigated the state-court products liability lawsuit.

I also note an opinion that this court issued earlier this week in *Downey v. State Farm Fire & Casualty Co.*, No. 00-3473 (7th Cir. Sept. 17, 2001), in which the court said it believed initially that no federal jurisdiction existed (the ultimate basis for this court's Rule to Show Cause issued against me) but provided the plaintiff with two opportunities to address the jurisdictional question, first at oral argument and then in a supplemental brief. This court concluded then that federal jurisdiction did exist in that case.

I received in the mail today, September 19, in an envelope postmarked September 18, a copy of the Defendants' Estimate of Total Expenses, which they say amounts to $5,180.00, a very steep sanction, particularly given the absence of any earlier indication that there even existed a jurisdictional issue. In this light, I ask that this court accord me a hearing of the sort provided under F.R.A.P. 46(c) so that I can try to convince it *that* I believed, and *why* I believed, throughout this litigation that federal jurisdiction existed in my fee-challenge lawsuit.

Respectfully submitted,

Beverly B. Mann
Respondent *Pro Se*
7261 North Campbell Avenue
Chicago, Illinois 60645
(773) 465-4587

September 19, 2001

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In the matter of: Beverly B. Mann
Hearing
Oct. 16, 2002

Speakers:
Judge Easterbrook
Judge Kanne
Judge Williams
Beverly Mann

Easterbrook: Good afternoon. The matter before the court is the disciplinary proceeding and the hearing with respect to attorney Beverly Mann. Ms. Mann...

Mann: Good morning, I mean good afternoon. My understanding is that, um, all that is at issue here is my failure to pay the $5,180 sanction assessed against me in my case against Dorothy Brown, the Cook County Clerk. Um, I'm planning to challenge that order collaterally elsewhere. I'm going to be moving out of state into another circuit and I'm going to try to challenge it collaterally by filing a...

Easterbrook: Ms. Mann, civil, final judgments in civil cases are not subject to collateral challenges, a lawyer surely knows. The Supreme Court has said that final judgments must be carried out whether or not a person agrees with them and that was, of course, the basis for the order here. The question at hand is how can somebody be a person, a lawyer, in good standing at our bar who refuses to carry out a final judgment entered by this court?

Mann: Well, um, I'm not sure that a sanction order is a judgment, is it? I don't know. I mean I...I...

Easterbrook: It's a judgment.

Mann: Judgment? Well, I mean there are exceptions to not being able to challenge judgments collaterally. State court judgments are challenged collaterally in federal court, and in this case I mean I have a number of arguments, including a jurisdictional one, that you didn't have jurisdiction to enter the order that you ordered, that you entered.

Easterbrook: Many people believe that our judgments are erroneous and we're certainly not free from error, but the way in which that is handled is to ask a higher court to review our judgment.

Mann: But there is no higher court that accepts...

Easterbrook: (interrupting) The Supreme Court of the United States is authorized to review sanctions orders entered by this court and indeed has on occasion reviewed sanctions orders.

Mann: But, that probably was a while ago because now it doesn't hear most cases at all. Actually what it does now is, um, only...actually, it's sort of a quasi legislature. It's not even really a court. It just makes law and the more clearly a lower court order violates standing law, or settled law, the less likely that court is to take it. And that's essentially what it said in an opinion issued last October in a case called *Overton vs. Ohio*. That was in a criminal case, but the court actually...it was a...the opinion was a dissent from a denial, in which four justices joined it, and they said that they

thought that because the order--the lower court order which was the Ohio Supreme Court--so clearly contradicted settled law that there should be, that the Supreme Court should issue a summary reversal of it, but they said that they're not a reviewing court. I mean they said outright they're not a reviewing court so five members didn't want to do that and so the other four gave in, I guess. Anyway, that's what they said in this case, that they actually said that they're not a reviewing court and they don't hear cases, they don't accept cases, um, when they...in order to reverse them when they contradict settled law. And I think that what you did did that in this case. And anyway I'm gonna try to challenge it. Um, I didn't...

Kanne: Ms. Mann, you're not asserting any inability to pay the sanction, are you?

Mann: Well, I haven't asserted that.

Kanne: I'm sorry, I didn't hear that.

Mann: I haven't asserted that but I . . .

Kanne: That's certainly something the court could take into account.

Mann: I couldn't pay that but I want to challenge it anyway because I don't... I never had any opportunity to address any of the issues on which it was based and I don't think that this court entered it...to conclude what it did this court had to actually reverse a state court order and address other cases that weren't even before it. One of them was my underlying case in state court, and there were other cases--two

other cases here, that were here but are not longer here. They were disposed and they just had nothing to do with this and they weren't before the court and the orders--I'm sorry, the records, the court records--weren't before the court and the court didn't know anything about them. And this court just never gave me an opportunity to address anything and the order was based on erroneous law, particularly Illinois law, and I feel that I was sanctioned for actually knowing an arcane area of Illinois law.

One of the primary grounds this court gave for its order is that I should have--could have and should have appealed from the state court judge's denial of my joinder motion, but under Illinois law you can't do that. There's a case called, I think, *S.C. Vaughan Oil vs. Caldwell Troutt*, or something, and it was issued by the Illinois Supreme Court in March of 1998 and it says that [unclear] a lot of other cases, Illinois Supreme Court cases, that kind of lead up to it, and that's what it says. It says as long as you have the option of refiling the case, which I did, or claim, it's not considered a final [unclear] and you can't appeal from it. And certainly the order itself wasn't on the merits, I mean it didn't even purport to be [unclear] that it wasn't. It was just a denial of jurisdiction, but you can't appeal those because you can refile them in Illinois and that's what it says and I knew that. I had to know that because it was pertinent to something involved in the appeal in the underlying case, so I was familiar with that case. I don't know, I mean if I hadn't...what the Illinois court says is that you can't--I mean if I had appealed it, they would have said you can't do that. Then I would have

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had to refile it if I wanted to pursue so I would have had to refile it and I would have... the Statute of Limitations might have run by that time. I mean the Illinois Supreme Court in one case--the oil case--said they recognized that was a problem, that was a danger, but it was so much, procedurally it was just so much easier and cheaper and quicker to simply refile than to file an appeal from the order denying a joinder motion, or rather in that case it was something else, but anyway...Illinois law says that you can't do that. I feel like I was sanctioned for knowing Illinois law and there's just a lot of other things.

Another big error in this court's order [unclear] is about what happens to the fees that I was challenging. They are paid, they are not used at all to support the court at all. As a matter of fact, they don't benefit the State of Illinois, which kind of raises the question of how, why there would be abstention grounds anyway because, I mean, abstention is to protect the state. The state was not, the state had no interest really at all in the state statute [unclear] it was totally to benefit the county and this court doesn't abstain when a county ordinance or policy is at issue, so I don't know. I mean it seems to me that this court was basing a lot of what it did in that case on an erroneous presumption, at least that the court fees [unclear]. Under Illinois law it's the state that funds all of the state courts fully and so this money--it was collected by the county [unclear], I'm sorry, but not for the courts. It's used only to fund the county clerk, the clerk of the court's office, but that's just a tiny percentage of it because the fees are huge and

people, the clerks, the deputy clerks in the court clerk's office are paid [unclear], so essentially what I was claiming was that it was a tax on access to [unclear]. I mean there were a lot of other challenges too. It's a graduated fee that has really no connection at all to, you know, what's at issue in the appeal. The feeling was that you can pay [unclear].

Not long ago a lawyer told me that his clients--he's a corporate lawyer and he said that his clients pay an average he figured of about $4,000 just to have the file transferred to the appellate court, which I think, I mean for a corporation that's not, you know, a big deal but for individuals it is. And then, of course, it depends on what law firm is representing the person [unclear] your opponent anyway. I mean, if it's one of the large law firms and they, you know, put [unclear] record, you know, at regular intervals and half of what they put in there is already in the record, you have to pay per page for that and I think it's, um, unconstitutional.

I think I over-prepared for this because I have a huge amount of notes and [unclear]. I did address in my response and [unclear] the issues that the Supreme Court raised in the *BE&K Construction* case in which they said that, essentially, fee shifting sanctions violate the first amendment unless the case [unclear] was a sham, was a fraud, and there was no finding of that here, and I don't think I was ever accused [unclear]. I know I wasn't accused here and I don't think ever in my whole life I was accused

of committing a fraud or sham type of thing. I certainly wasn't.

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There was another issue. Given that abstention is not absolute and there's no--it's not precise--I don't know how I could have foreseen that. I mean, no one, my opponent never raised it and in other cases people who, when the defendant failed to raise the abstention defense, it's been deemed waived, and I don't know how I could have anticipated that this court would decide to abstain. I mean there are a lot of reasons why I don't think abstention would be even appropriate and I don't know why...

Easterbrook: (interrupting) Ms. Mann, the arguments you're now making are arguments all having to do with either the merits of the resolution of the original appeal or the decision to award sanctions, but the question I asked you at the outset is is there any reason why the court should permit somebody who has simply, who has taken the position that I don't have to follow orders that I believe are incorrect, why such a person should remain a member of the court's bar in good standing. We entirely appreciate that you don't believe that those orders were substantively correct, but there is nonetheless an end to litigation. The question is as I have stated.

Mann: I...I think there are outer limits to what a court can, has legal authority to offer. In preparing for this I was thinking, you know, what if this court just suddenly one day issued an order, flipped through the phone book, and just picked out two names and said somebody owes somebody money and you have to pay. I mean,

wouldn't that be challengeable? Would the person who was ordered to pay it, would that person actually have to pay that money? I mean, it just seems to me...

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Williams: (interrupting) The problem is we didn't pick your name out of the phone book...

Mann: (interrupting) No, I know that.

Williams: You picked the case, you're the respondent, you know what I mean,...

Mann: I know.

Williams: So...

Mann: I know, I was going to get to that. I mean, but then, it just seems to me that what you did--not you, but the other judges did--um, is, they issued an order on things that weren't even at issue in the appeal and they just kind of put it--well, they put it under this caption with my name on it--and I just don't think that...I just don't think this court had even personal jurisdiction over me to address...

Easterbrook: Ms. Mann, you were the plaintiff...

Mann: No, but I was...

Easterbrook: ...the court obviously had personal jurisdiction...

Mann: No, but that's my point though, that I was the plaintiff in one case. I wasn't a plaintiff here in the other cases or in other things. I was the plaintiff in this one case and, um, I mean

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Justice Scalia said something which I have cited in my notes here, but I don't remember the name of it, um, that the court, an appellate court, they're bound to what an appellate court can do and everything else it does is ultra vires.

What I'm saying is that when there's no connection between what you're putting into this order, what you're addressing in this order, and what the case is before you in which I was the plaintiff and the appellant, then it seems to me that there's really no difference, no material difference between that and your just picking names out of a phone book and issuing orders. I mean you couldn't, for example, you couldn't, um, I mean you couldn't just kind of look through your docket sheets and just take cases and put captions on and just order one person without knowing anything about the case, to just order someone to, like, you know, John Smith has to deed over his house to ABC Corporation. I mean that would clearly, I think, be beyond your legal authority and it doesn't seem to me that what you did was that much different, particularly since I was...there was just absolutely no due process here. There was...

Kanne: Ms. Mann, if you weren't a member of the bar of the 7th Circuit, then you wouldn't be here today.

Mann: But, I--that's true. But could you [unclear] pick some lawyer's name out of your list of licensed attorneys here and just say, you know, this attorney...

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Easterbrook: (interrupting) I think the only way your name was picked was one who hadn't paid sanctions.

Mann: No, I'm not talking about that. I'm moving backward to, um, the order involved from last year, not this hearing, not this [unclear]. I'm just saying that I don't think...

Easterbrook: That in the end is the problem. The Supreme Court has said that even with respect to orders issued *ex parte* as temporary restraining orders, for example, often are, the object of the order must obey it on pain of sanctions--very substantial if contempt of court--unless that order is upset in the regular legal process.

Mann: But that's the point, is that...

Easterbrook: (interrupting) The fact that the respondent or defendant believes the order to be incorrect does not justify disregarding the judicial instructions and that's our problem.

Mann: But can you just do anything you want to without any kind of due process? I mean, you know, I had no...I don't know how you can reverse an order of a state court judge, which is what you had to do essentially. I mean...

Easterbrook: Look, I think this line of argument is not one that is likely to be successful. Do you have any other line of argument?

Mann: Is there anything I could say to not be disbarred? I mean -- it's awful --like I embezzled money from a client or something. It's just really strange and I haven't ever done anything else wrong here or anywhere else as a

lawyer. I just...is there anything else I can say? Any other...

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Kanne: You're aware that if you're removed from the roles of attorneys permitted to practice in this court that doesn't affect your state law license. Do you understand that?

Mann: I don't ... but...I don't know. I just...I guess I would just ask you to read what I wrote in my response.

Kanne: Uh-huh.

Mann: That's all. Thank you.

Easterbrook: Thank you very much, Ms. Mann. The matter will be taken under advisement. The court is in recess.

Transcribed by Michigan Avenue Office Services, Inc., November 11, 2002.

In re: ATTORNEY BEVERLY B. MANN

Upon consideration of the MOTION FOR EN BANC CLARIFICATION RE: WHETHER THIS COURT RETAINS JURISDICTION REGARDING ENFORCEMENT OF THE SANCTION ORDER ENTERED IN APPEAL NOS. 98-1750 AND 98-3595, AND WHETHER THAT SANCTION ORDER CONSTITUTES A JUDGMENT OF THE SORT THAT CAN BE REGISTERED WITH THE COOK COUNTY RECORDER OF DEEDS AND ENFORCED THROUGH A STATE-COURT COLLECTION PROCEEDING, filed on November 22, 2002, by Beverly B. Mann,

IT IS ORDERED that the clerk of this court shall return the motion to Ms. Mann on the ground that it relates to the underlying orders in appeal nos. 991705 and 99-3595 and Ms. Mann is restricted from further filings in these appeals.

Transcript of Argument
General Auto Service v. City of Chicago

No. 02-1588

Dec. 6, 2002

Thomas E. Baltz
Erika A. Dunning
Circuit Judge Frank H. Easterbrook
Circuit Judge Kenneth F. Ripple
Circuit Judge Daniel A. Manion

EASTERBROOK: Good morning ladies and gentlemen the first case this morning is General Auto Service against Chicago.

Mr. Baltz?

BALTZ: Good morning. May it please the court, my name is Tom Baltz and I represent the appellants in this action the plaintiffs below. The primary issue before this court is whether the Younger abstention doctrine mandated a dismissal of plaintiff's claims as the district court concluded despite the fact that (1) plaintiffs were not parties to any related state-court action, (2) plaintiffs were denied leave in their petition to participate in the related state-court court action at issue, and (3) the state-court order denying plaintiffs leave to intervene was not a final and appealable order. Plaintiffs submit to this court that the requisite elements for invoking the Younger abstention doctrine were not present in this case and further maintain that the district court's dismissal of this action pursuant to the Younger abstention doctrine therefore should be reversed and remanded to the district court for proceedings on the merits of plaintiffs' claims.

Now this court has repeatedly held that Younger – the, the – applying Younger has three basic elements. A federal district court will abstain from jurisdiction if (1) the federal action is filed during the pendency of a state proceding, (2) the proceeding involved important governmental interests, and, third, most importantly for this appeal the state proceding provides the plaintiff with an adequate opportunity in which to assert the federal claims at issue.

In this case, that third element simply was not met. As stated, the plaintiffs --

EASTERBROOK: Why didn't you appeal from the denial of the motion for leave to intervene?

BALTZ: Well, your Honor, it was a decision we discussed with our clients. The order that was entered by Judge Durkin in the Cook County Circuit Court was not a final and appealable order. It had not been given a –

EASTERBROOK: What – What Illinois case do you rely on for the proposition that one cannot appeal from the denial of a motion to intervene? You can certainly appeal from such a denial in federal court.

BALTZ: Ah, your Honor, it falls under Illinois Supreme Court Rule 304. Um, I do know that there is Illinois case law. I know that it was recognized by the federal district court for the Northern District of Illinois in Hernandez.

EASTERBROOK: No, I – I want state decisions. Do you have any state decisions to cite?

BALTZ: Ah, not off the top of my head, your Honor, I do not. If it may be helpful, I do know that in interpreting Illinois law the Hernandez case, a 1978 Northern District of Illinois case, cited the specific Illinois Supreme Court Rule, Rule 304, the Rule that – that –involves certification of non-

appealable orders to make them final and appealable, and that district court panel specifically acknowledged that without 304 certification an order is not final and appeal if it does not dispose with all of the matters in the case.

But – but I think those two points – the fact that my clients were not parties to that state court action, and (2) my clients were denied leave to intervene in that state court action, are the two salient facts that show that Younger cannot apply in this case.

On a related matter, the district court seemed to find in its order of dismissal and certainly the City of Chicago has argued that plaintiffs had a duty to exhaust state-court remedies before coming to – before coming to federal court. More specifically I think the argument is that my clients had a duty to appeal the denial of the petition to intervene.

Again what is important to note here is that in this case the order denying intervention was not a final and appealable order and the federal district court panel in Hernandez found that that was a – a – a salient factor in determining that Younger should not – should not apply. The fact that it has been argued that intervention was – an appeal of the denial of the intervention was a necessary step, it also goes against this court's ruling in the Hoover v. Wagner case.

And specifically that case like this case involved a situation in which the plaintiff in the federal action filed his lawsuit during a pending state-court action. Like this lawsuit, the plaintiff in Hoover was not a plaintiff in that state-court action.

Under those circumstances, this court refused to uphold the district court's dismissal based on Younger, although it upheld the dismissal on another basis.

RIPPLE: Were the parties in those – in that case in privity with each other?

BALTZ: Um, I don't believe there was an allegation that they were in privity with one another.

RIPPLE: Their relationship was fundamentally different than the relationship in this case? In that sense, your honor, yes, except that we would argue and we do argue that we are not in privity.

RIPPLE:I know, but assuming that you are, isn't that a fundamental difference?

BALTZ: It is a – it is a difference. I don't think it is a determinative difference. And I still think that this court's opinion in Hoover is rather telling on this issue, because this court stated that nothing in Younger or the case following it suggests that persons claiming a violation need to seek out an existing state-court action in which they might join. And it has nothing to do, the court stated – uh, uh – there's a limited duty regarding exhaustion of state judicial remedies. But this court stated that that is not a duty to intervene, and it has no application to a challenge to a statute for an ordinance --

EASTERBROOK: Perhaps I'm misunderstanding my colleague – the burden pf my colleague's question, and its one that troubles me, too. And one would ordinarily think that this would come under the heading of claim preclusion. Your privy has litigated in state court and lost. Why isn't your suit precluded, quite independent of Younger?

BALTZ: Well, your Honor, I would answer that in a fashion that we contend that although Whiteco was the tenant of F.A. White Properties, in this particular instance they should not be considered in privity or our privity.

EASTERBROOK: But let's assume that we think that a landlord and a tenant are in privity, especially when they're trying to litigate the very same issues about the very same parcel of property. Now – so where does that leave us on the law of preclusion?

BALTZ: Well, that's an awfully big presumption, your Honor. I think the case law is pretty clear that if we're talking about the same cause of action that parties in privity can be precluded by prior state-court actions. I would say that in this instance that this court has chosen not to, uh, proceed – um, if I might find the case – the Bickum (ph) case has held that in situations –

EASTERBROOK: I – I – I don't want to stop you from citing federal decisions, but again the question about the scope of preclusion is one of state law under 28 U.S.C. 1738.

BALTZ: Yes

EASTERBROOK: So in order to figure out what the effect of preclusion is we need to figure out what the state courts have to say about this.

BALTZ: I would say that if this court presupposes or assumes for purposes of the question that we are in privity for purposes of res judicata purposes – ah, ah, we have a difficult hurdle. I think our argument boils down to – that Illinois law, given the Progressive Land Developers case, Illinois Supreme Court case, given the Boyd Illinois appellate court case, does not favor the term privity any longer. The Restatement of Judgments, Section 42, says that the preferred modern approach is not to look at parties in privity but for purposes of at least for claim preclusion and res judicata the more modern approach, the – the more, uh, defendable approach, is one which actually looks at whether the interests are being represented – if that's an answer to your question, your Honor.

EASTERBROOK: 1738 says we have to give a judgment entered in state court the same preclusive effect that the state court itself would give it. So my – burden of my question about authority is: Which – If you say Illinois has abandoned the idea of privity, or something like that, what, what case do you point us to.

BALTZ: I would point you to the Progressive Land Developers case. I would – which is an Illinois Supreme Court case. I would further point this court to the 4th District appellate court case of Illinois, the Boyd case, and the other cases cited therein. Both of those cases have cited to – uh, uh, the Restatement 2nd of Judgments, which expressly abandons – uh, uh, the traditional notion of privity and really looks to a case-by-case analysis of where these parties stand and whether Party 1 is actually representing the interests of the other party. And in this case this court can look to the decision denying administrative review to Whiteco by the state circuit court where it repeatedly cites to the lack of evidence set forth by – by Whiteco in support of the most basic of claims, and we also have as part of the record that although some hand-waving mention of constitutional claims was made, no argument was ever presented, uh, in support of those claims in front of the Zoning Board of Appeal, no argument whatsoever in the memorandum of law filed by Whiteco in front of the, uh – in front of the, uh, state – uh, Cook County state court.

I would like to reserve the remainder of my time for rebuttal. Thank you.

EASTERBROOK: Certainly, Mr. Baltz.

EASTERBROOK: Ms. Dunning?

DUNNING: May it please the court, the lessee that contracted to place a sign on General Auto's property has already litigated the question whether it had the right to obtain

a sign permit. General Auto's suit also confronts the same right of that lessee to obtain a sign permit. For two reasons, the dismissal should be affirmed. First, on the Younger issue, whenever a litigant fails to exhaust a state-court remedy, Younger applies. Here, there's no question that General Auto had a state-court appellate remedy.

EASTERBROOK: It didn't have a state-court remedy on the merits.

DUNNING: It had an appellate remedy on its –

EASTERBROOK: It was told that it couldn't intervene and it refused to entertain its argument on the merits. Indeed, one would think that almost by definition Younger is inapplicable when the litigant goes to the state court, asks the state court to entertain his claims, and the state court says, "Go away. We won't hear you out on the merits."

DUNNING: Well, that's the same – a similar situation was, uh, presented in Sekerez, uh, where – where a, uh, it was actually a, uh – I believe in an attorney disciplinary matter, or something, and they brought constitutional arguments in front of the board where they were supposed to bring it in front of and the board said it won't hear these arguments, and the – and this court said, no, you have to go back, you should appeal that because you can appeal the fact that they would not hear your arguments. Here we have a similar situation, where they court appeal it, you know, but that they could definitely appeal it at the end judgment. Illinois law is clear on that. They could appeal that they were not allowed to intervene. Furthermore, while General Auto –

RIPPLE: Is it clear that they could not have intervened as an interlocutory matter?

DUNNING: Um – well, we believe that Mr. Heary was entitled to intervene but the corporation is a separate entity from him. And we think that his request for intervention would fall under ordinary Illinois state rules that a party with an interest in the litigation would be allowed to intervene unless its interest is adequately represented in the litigation by another party. And here because we believe that – the state said because General Auto was in privity with Whiteco that they would –

RIPPLE: That's a question of whether you think the state court was in error or not – can uh on the intervention motion.

DUNNING: Right.

RIPPLE: But what about the issue of the interlocutory appeal. Could the uh could the court have uh rather could either of the corporation or the individual have – have taken an interlocutory appeal under state practice?

DUNNING: They could have attempted to take one. It would not have been as of right.

RIPPLE: Well you can always attempt, but I mean, what does the law say about whether you have a right to take that - the law permits that intervention – that intervention – that appeal – that appeal.

DUNNING: Yes the law permits an interlocutory appeal in that situation and the law clearly allows it to be appealed after final judgment, of course. Anything that could have been appealed on interlocutory appeal can be appealed after final judgment.

RIPPLE: Is there Illinois authority for the opportunity to take a, uh, a, uh, interlocutory appeal.

DUNNING: Yes, we've cited that in our brief.

RIPPLE: So you just think the – your – your, your colleagues have misread the law.

DUNNING: Uh – I'm sorry?

RIPPLE: Well, your colleague indicated that he had advised his client that there was no right of interlocutory appeal under that state practice and therefore they couldn't take one.

DUNNING: There was no right of interlocutory appeal. Um, it wouldn't have been an interlocutory appeal as of right, but it would have been an interlocutory appeal as of discretion, where the court take such an appeal.

RIPPLE: I see. You have to ask for leave?

DUNNING: Right. Right.

RIPPLE: I see.

MANION: Would they have to petition to intervene at the Supreme Court or whatever at the end of the case, if they haven't been a party?

DUNNING: Um, I think their only place in this litigation would be to appeal the denial of their intervention. So at that point –

MANION: You said something about at the end, once the case is decided –

DUNNING: At final judgment.

MANION: And they could – what? Appeal what? Appeal something where they –

DUNNING: They could appeal the denial of their motion.

RIPPLE: Ms. Dunning, if I could stay with Younger but go to another facet of it for a moment –

DUNNING: Sure.

RIPPLE: Is a – How important is privity in terms of one being bound by the actions of the person with whom you're in privity under the Younger doctrine. It seems to be fairly well – very well established with respect to res judicata –

DUNNING: Right

RIPPLE: – but the cases don't really talk about privity very much in Younger – in the Younger context. Is it – can we – do the same standards apply or do we use some other kind of standard to determine the relationship of two parties under the Younger doctrine?

DUNNING: Well, in this case, uh, we believe that in terms of applying Younger, um, that privity is not necessary because they had the appellate remedy through their denial of their motion to intervene. And so it's not dependant on whether they were in privity. Uh, the re judicata argument of course is, and we believe that they were in privity.

RIPPLE: Oh. If you – I can just put to one side for a moment the right – the contingent right, if you want – to appeal the intervention, uh, if we just look at it as a matter of the relationship of the parties, what is it about the relationship of the lessor and the lessee that makes the lessor bound or subject to the Younger doctrine in this case?

DUNNING: Uh, as – You mean as the, uh, district court applied Younger, as opposed to our argument?

RIPPLE: Yeah.

DUNNING: O.K. Um, well – uh, obviously, we've argued in our brief that its res judicata that applies now. But in

terms of Younger, it's – it's clear that – that parties that are in an interrelationship such as this should be, uh, applied Younger. But like I said, we didn't brief –

RIPPLE: Why?

DUNNING: We didn't brief this issue.

RIPPLE: But you do want us to sustain the –

DUNNING: Yes.

RIPPLE: – the district court's view on Younger? But you think – but your resting entirely on the intervention motion?

DUNNING: And on the res judicata issue.

RIPPLE: And on the res judicata issue?

DUNNING: Right.

EASTERBROOK: Let me come back to the intervention. What was the City's position on intervention in the state court?

DUNNING: I believe the City opposed it. We opposed it.

EASTERBROOK: What?

DUNNING: We opposed it.

EASTERBROOK: You opposed it. Things get very curious, don't you – don't they? You say that they should have appealed within the state system, but that on your view the denial of the intervention was correct.

DUNNING: Right

EASTERBROOK: Why is it that Chicago thinks that they had to appeal a correct decision?

DUNNING: Well, Kaufman says clearly that it doesn't matter whether you think that your appeal will be successful –

EASTERBROOK: It's, it's not – no the question I'm asking now is not what your opponent thinks but what you think. What you're asking us to say is that Younger bars a case in which the state court not only refused to hear the party's argument, but did so correctly. The state court was correct in refusing to hear the party's arguments –

DUNNING: Right

EASTERBROOK: – in your view.

DUNNING: Right. Um, Well, the state – I – I think it's because – well, it is because, in this case the parties are in privity and that's the reason. But in any case no matter whether they're in privity or not when the – when there's an appellate remedy, then they need to go after it and it's clear from the case law –

EASTERBROOK: An appellate remedy is something you use when there was an incorrect decision by a trial court. If everybody agrees the trial court was correct, what's the

point of an appeal? Right? If as a matter of state law they were in fact not entitled to intervene and that's been determined correctly by the trial court – and in your view that's exactly what happened – what's the point of an appeal?

DUNNING: Well, I think that the reason that this becomes confusing is because – it's because they had no – uh, because they were in privity and because they had no right to bring these claims on their own in federal court or anywhere else because they were in privity with a litigant who was already pursuing their interests, uh –

EASTERBROOK: Right. I – I understand that argument. It may be right or wrong. But it seems to me that the further argument that they had to appeal, that they had to proceed themselves, is hard to reconcile with your own position. And a litigant doesn't have to make all possible arguments. It can confine itself to the arguments that are sustainable.

DUNNING: Um – well, it's clear from the case law that – that the application of Younger through this Kaufman doctrine is not dependant on that, and the reason is because, you know, in this case – and we think it's a little clearer because there's a privity issue, but in another case where there's a question, that the federal court is not in a position and should not be in a position under the Sekerez doctrine to pass judgment on whether or not the state court correctly applied its own laws, and –

EASTERBROOK: Exactly. We assume that state courts correctly applied their own laws, and that's why we assume, as you indeed are arguing –

DUNNING: Right.

EASTERBROOK: – that the denial of intervention was correct. And if the denial of intervention was correct, it's

very hard to make the Younger claim, except indirectly though the privity argument.

DUNNING: Right. Uh – it's an alternative argument that we've made, and, uh – If I may, I' like to go on to the res judicata argument.

On res judicata, we have three points. First, res judicata, of course, applies to arguments that were raised and to arguments that could have been raised. Second, under Illinois law, the privity inquiry asks only if the interests are aligned. Progressive Land Developers makes this clear. In this case the interests are completely concurrent. Both Whiteco and General Auto seek to have a sign permit issued to Whiteco. Third, there are a lot of argument that there can be no preclusion as to arguments not made by Whiteco, would abolish res judicata in Illinois in cases of privity. There's nothing in Illinois law that indicates that only collateral estoppel and not res judicata applies to parties in privity.

Uh – we urge this court to affirm the district court's dismissal [inaudible].

EASTERBROOK: Um-hmm. Thank you, Ms, Dunning.

EASTERBROOK: Anything further, Mr. Baltz?

BALTZ: Your Honor, in answer to – in, hopefully, further answer to your prior question, our case has clarified the Harris Trust case, a 1978 Illinois appellate court case cited by the defendants, and in that case what the Harris court – Harris Trust court found was that under Illinois law an order denying a motion to intervene is not immediately appealable, and in that specific case the trial court's order therein denying intervention only became final and appealable by reason of a subsequent Rule 304 certification by the trial court some four months after the order denying intervention had been entered.

Related to that point of the fact that the order denying intervention was not immediately appealable, the Hernandez case found that point very relevant to the issue of whether a case can fall – properly fall under Younger. And that court held that, "Since certification of an interlocutory appeal is

discretionary and denial thereof is not appealable, Illinois Supreme Court Rules 304 and 308 also do not provide plaintiffs with a meaningful opportunity to appeal any adverse ruling." A meaningful opportunity –

EASTERBROOK: Well, assuming that there is no entitlement as of right to appeal immediately, there are still two opportunities. One is to request appeal, which I gather you didn't do, and the other is to appeal from the final decision, which your client most certainly didn't do.

BALTZ: That is true, your Honor. But, uh, ultimately that is not something that is required under Younger. We have asserted that by advancing that position, this court and the trial court would have to find an extreme duty on the part of plaintiffs to (1) suspend the pursuit of their federal claims and wait for the non-appealable state court order to become final and appealable assuming – uh, uh – there was no 304 certification upon the final disposition of the state-court action to then appeal such order an otherwise exhaust the appellate court process and assuming success to then actually assert the federal claims for the first time, when the case is finally remanded back to the state-court. And it's our position that Younger simply is not that broad.

Thank you, your Honor.

EASTERBROOK: Thank you, counsel. The case will be taken under advisement.

GENERAL AUTO SERVICE STATION LLC, et al., Plaintiffs-Appellants, v. CITY OF CHICAGO, ILLINOIS, and LAMAR ADVERTISING CO., Defendants-Appellees.

No. 02-1588

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

2003 U.S. App. LEXIS 2213

December 6, 2002, Argued

February 10, 2003, Decided

PRIOR HISTORY: [*1] Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 00 C 368. Rebecca R. Pallmeyer, Judge.

General Auto Serv. Station v. City of Chicago, 2002 U.S. Dist. LEXIS 2276 (N.D. Ill. Feb. 8, 2002).

DISPOSITION: Reversed and remanded.

JUDGES: Before EASTERBROOK, RIPPLE, and MANION, Circuit Judges.

OPINIONBY: EASTERBROOK

OPINION: EASTERBROOK, *Circuit Judge*. Since 1962 a large commercial sign has been painted on the south wall of the building at 1127 North State Street in Chicago. Sometime after 1962 lighting was added. General Auto Service Station owns the building; Whiteco Outdoor Advertising leases the wall and operates the sign. (We skip over the details of the ownership and lease, which may be found in the district court's opinion, 2001 U.S. Dist. LEXIS 23711 (N.D. Ill. May 17, 2001), and for consistent usage we refer to the lessee as

Whiteco even though the current lessee is Lamar Advertising Company.) In 1990 Chicago amended its zoning ordinances to set a limit of 100 square feet on illuminated signs located within 250 feet of residential properties. Whiteco's sign is 1,534 square feet, and the building is about 200 feet from the nearest residence. Chicago Municipal Code § 17-6.7-1(a) is a grandfather clause deeming any sign "that was lawfully erected pursuant [*2] to a permit lawfully issued prior to the effective date of this section [to be a] legal non-conforming sign." Whiteco sought to take advantage of this proviso, and in 1994 the Zoning Administrator tentatively agreed. This tentative approval did not become definitive (the record does not explain why), and in 1997 the City issued a notice of violation. Whiteco invoked the grandfather clause again, but this time the Zoning Administrator and the Zoning Board of Appeals both said no, on the ground that even if Whiteco's pre-1990 use was lawful, it lacked a permit verifying this, and the grandfather clause is limited to signs "erected pursuant to a permit". Whiteco was ordered to pay a fine of $ 250.

Whiteco sought judicial review of the Zoning Board's decision in state court, contending that the Board's order was an incorrect application of the City's ordinance. General Auto, the building's owner, filed this suit in federal court, under 42 U.S.C. § 1983, contending that the ordinance and the Board's action, taken together, violate both the first amendment and the due process clause of the Constitution. Both lost, though for different reasons.

In Whiteco's suit, [*3] the state court held that Whiteco had not made the proper arguments before the Board, forfeiting its right to judicial review, and at all events had failed to establish that the pre-1990 use was "lawful" with or without a permit.

This would have entailed showing what the zoning rules and permit requirements had been, and where residential properties were located, not only in 1962 but also in whatever year the sign became illuminated, all subjects on which both

the administrative and the judicial records were silent. *Whiteco Outdoor Advertising v. Chicago*, No. 98 CH 14280 (Cir. Ct. Cook County Mar. 2, 2000), affirmed, No. 1-00-1194 (Ill. App. 1st Dist. Sept. 17, 2001), leave to appeal denied, 198 Ill. 2d 610, 766 N.E.2d 245 (2002).

In General Auto's suit, the district court did not reach the merits, instead abstaining under *Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971), and its successors. *Younger* holds that, except in extraordinary situations, a federal court may not enjoin ongoing state proceedings that arise out of important state interests, if the litigant has an adequate opportunity to present its constitutional [*4] arguments in the state forum. One problem with abstention is that General Auto did not ask for an injunction or declaratory judgment, see *Samuels v. Mackell*, 401 U.S. 66, 27 L. Ed. 2d 688, 91 S. Ct. 764 (1971) (equating the two remedies), that would halt the litigation between Whiteco and the Board; it sought only a declaration of *its* substantive rights vis-a-vis the City. A second problem is that no state forum was available to General Auto. The City has not fined it, so there is no pending (or impending) case in which it could mount a constitutional defense. Whether it sues in state or federal court, General Auto will be the plaintiff. What is more, General Auto *tried* to litigate in state court -- and was rebuffed. It sought to intervene in Whiteco's suit, a sensible step that would have enabled the state judiciary to resolve all theories affecting all parties at one go. Yet Chicago opposed its motion to intervene, and the state court denied the motion. Once the state court has announced that it will not entertain constitutional arguments, *Younger* is no longer applicable.

Chicago nonetheless asks us to affirm the district court's decision because, the [*5] City insists, General Auto could and should have appealed the denial of its motion. It may not have been required to intervene, see *Hoover v. Wagner*, 47 F.3d 845, 848 (7th Cir. 1995), but once it started down that road it was "in" state court and had to persevere, the City

submits. See *Sekerez v. Supreme Court of Indiana*, 685 F.2d 202, 206 (7th Cir. 1982). Even if it could not have appealed immediately (for Illinois treats the denial of a motion to intervene as an interlocutory order appealable only in the court's discretion, see *Chicago, Milwaukee, St. Paul & Pacific R.R. v. Harris Trust & Savings Bank*, 63 Ill. App 3d 1012, 380 N.E.2d 835, 20 Ill. Dec. 626 (1st Dist. 1978)) General Auto could have appealed from the final decision in Whiteco's suit. True enough, but appeal exists to correct error. If the court was right to deny General Auto's motion, an appeal would have been pointless. And in Chicago's view the state court *was* right. After all, Chicago opposed its motion to intervene. Having persuaded the state court that General Auto was not entitled to adjudication of its constitutional theories, Chicago is estopped to argue [*6] in federal court that General Auto could have litigated in state court if only it had tried harder. See *New Hampshire v. Maine*, 532 U.S. 742, 749-51, 149 L. Ed. 2d 968, 121 S. Ct. 1808 (2001) (discussing the doctrine of judicial estoppel); *Astor Chauffeured Limousine Co. v. Runnfeldt Investment Corp.*, 910 F.2d 1540, 1547-49 (7th Cir. 1990). We therefore take the state court's decision about intervention as correct, which means that the conditions for *Younger* abstention have not been satisfied.

Offering additional arguments in support of the judgment, Chicago contends that General Auto's claim is barred by the *Rooker-Feldman* doctrine. See *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 68 L. Ed. 362, 44 S. Ct. 149 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983). Decisions of state courts may not be challenged in litigation under § 1983; instead the aggrieved party must pursue all remedies through the state system and then seek certiorari under 28 U.S.C. § 1257. If General Auto were contesting, as a violation of its constitutional [*7] rights, the state court's decision not to permit intervention, then the *Rooker-Feldman* doctrine would come into play. But this is not General Auto's point; its due process theory is that Chicago's zoning officials violated its

rights by refusing to classify the sign as a lawful non-conforming use. Such a protest, concerning the adversary's pre-litigation conduct rather than an injury caused by a judicial decision, is unaffected by the *Rooker-Feldman* doctrine.

Chicago also contends that the district court's judgment may be sustained on the basis of claim preclusion (res judicata): Whiteco, which was in privity with General Auto, litigated and lost in state court. Although it lost for failing to build a proper record and make the right arguments in the administrative forum, and did not present any constitutional theory, Illinois applies the doctrine of claim preclusion to all arguments that were *or could have been* presented to the tribunal. See *River Park, Inc. v. Highland Park*, 184 Ill. 2d 290, 306, 703 N.E.2d 883, 891, 234 Ill. Dec. 783 (1998); *People ex rel. Burris v. Progressive Land Developers, Inc.*, 151 Ill. 2d 285, 294-96, 602 N.E.2d 820, 825, 176 Ill. Dec. 874 (1992). [*8] See also *Durgins v. East St. Louis*, 272 F.3d 841 (7th Cir. 2001) (discussing Illinois law). So if Whiteco was General Auto's stalking horse, then General Auto has had its day in court and may not try again. See *Montana v. United States*, 440 U.S. 147, 59 L. Ed. 2d 210, 99 S. Ct. 970 (1979).

One sign that Whiteco was not General Auto's proxy is the fact that General Auto tried to intervene -- and the state court denied its motion not on the ground that it was already well represented, but on the ground that Whiteco and General Auto are distinct, and that because General Auto had not appeared in its own name in the zoning proceedings it could not attack the Board's decision. Once again Chicago has switched sides: having persuaded the state court that Whiteco and General Auto should be treated as different entities, it now seeks to persuade us that they are (or should be treated as) the same entity. Once again this flip-flop is barred by the doctrine of judicial estoppel. The state court held, at Chicago's urging, that Whiteco's deeds are not attributed to General Auto. As we must give the state court's decision the same effect that the

state system would [*9] give it, see 28 U.S.C. § 1738, this fatally undercuts Chicago's plea of res judicata. If Whiteco's appearance before the Zoning Appeals Board was not imputed to General Auto on the basis of privity, then Whiteco's litigation in state court should not be imputed to General Auto on the basis of privity.

For what it may be worth, we very much doubt that state courts would treat Whiteco as General Auto's representative if they were to tackle the matter free of any concern about Chicago's litigation strategy. Illinois follows the Restatement (2d) of Judgments § 42(1) (1982), which states as a blackletter principle that a "person is not bound by a judgment for or against a party who purports to represent him if . . . (e) The representative failed to prosecute or defend the action with due diligence and reasonable prudence, and the opposing party was on notice of facts making that failure apparent." See, e.g., *Diversified Financial Systems, Inc. v. Boyd*, 286 Ill. App. 3d 911, 918, 678 N.E.2d 308, 312, 222 Ill. Dec. 696 (4th Dist. 1997). Thus it is not enough that Whiteco and General Auto are trading partners; Whiteco's litigation is preclusive [*10] against General Auto only if Whiteco acted with reasonable prudence to protect General Auto's interests. Yet Whiteco lost precisely because of lapses before both the agency and the court. Chicago not only was on notice of these deficiencies but also took advantage of them by urging that Whiteco's suit be dismissed without a decision on the merits. This is not to say that Whiteco could be deemed an inadequate representative for omitting a constitutional theory; in zoning disputes, state-law theories often offer the best chance of success. See, e.g., *River Park, Inc. v. Highland Park*, 23 F.3d 164 (7th Cir. 1994); *Northside Sanitary Landfill, Inc. v. Indianapolis*, 902 F.2d 521 (7th Cir. 1990). But Whiteco did not prosecute even the state-law theories competently. To have any hope of success under the grandfather clause, it had to show that the sign was lawful, and possessed any permits that may have been required, when first illuminated, but it did not offer any evidence on these matters. General Auto is entitled to its own

crack at the subject. It has better incentives than Whiteco did: a lessee will not invest in litigation more than it expects the [*11] remaining months or years of the lease to be worth, while the owner will take account of the property's long-term value.

We do not consider whether General Auto has a good federal claim. The merits, which have not been briefed in the appeal, must be addressed initially by the district court.

REVERSED AND REMANDED

BEVERLY B. MANN, Plaintiff-Appellant, v. DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and COOK COUNTY, ILLINOIS, Defendants-Appellees.

Nos. 99-1750 & 99-3595

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

October 16, 2001

Before:

Hon. Frank H. Easterbrook, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

Hon. Michael S. Kanne, Circuit Judge

ORDER

The following are before the court:

1. **NOTICE TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND/OR REQUEST FOR LEAVE TO FILE RULE TO SHOW CAUSE, FILED ON OCTOBER 11, BY COUNSEL FOR THE APPELLEES.**

2. **RESPONSE TO NOTICE TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND/OR REQUEST FOR LEAVE TO FILE RULE TO SHOW CAUSE, FILED ON OCTOBER 15, BY THE APPELLANT PRO SE.**

On September 19, 2001, this court ordered the appellant Beverly Mann to pay $5,180.00 to the Office of the State's Attorney of Cook County within 14 days and file proof of payment with the clerk of this court. To date, the appellant has failed to make the required payment. The clerks of all federal courts in this circuit are directed to return unfiled any papers submitted either directly or indirectly by or on behalf of Beverly B. Mann unless and until she pays in full the sanction that has been imposed against her. In accordance with our decision in Mack, exceptions to this filing bar are made for criminal cases and for applications for writs of habeas corpus. Beverly B. Mann is authorized to submit to this court, no earlier than two years from the date of this order, a motion to modify or rescind this order.

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K - 1

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

BEVERLY B. MANN,

Petitioner,

v.

THE UPJOHN COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT, AND THE ILLINOIS SUPREME COURT

Beverly B. Mann
Petitioner *Pro Se*
7261 North Campbell Avenue
Chicago, Illinois 60645
(773) 465-4587

CITATION TO APPELLATE OPINION

Petitioner Beverly B. Mann filed this lawsuit in the Circuit Court of Cook County, Illinois. Cross-appeals from a variety of trial-court orders were timely filed with the Illinois Appellate Court, First District, which on June 29, 2001, issued an opinion in *Beverly B. Mann v. The Upjohn Company*, 324 Ill. App. 3d 367; 753 N.E.2d 452 (2001). (App. C.) Mann timely appealed to the Illinois Supreme Court as of right under the Constitution of the State of Illinois, Art. VI, sec. 4(c), and alternatively petitioned for discretionary review. That Court on December 5, 2001, rejected the appeal. (App. B.) On February 27, 2002, 7th Circuit Justice John Paul Stevens granted a motion Mann had filed a few days earlier for an extension of time, to and including April 4, 2002, in which to file this petition. (App. A.)

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257 and the Constitution of the United States, Fourteenth Amendment, Section 1.

STATEMENT OF THE CASE

This petition seeks review of the Illinois appellate court's decision to deny Petitioner appellate review of dispositive orders in this litigation upon stated grounds that appear to violate the Fourteenth Amendment's due process and equal protection clauses. The petition also seeks review, under the under those clauses, of the Illinois Supreme Court's failure to comply with a state constitutional mandate to review the appellate court's denial of substantive appellate review of the dispositive trial-court orders.

The petition also requests review of the propriety under the Fourteenth Amendment of a stated court policy of requiring the designation of a paid expert witness by a plaintiff in certain categories of cases as a prerequisite to a trial-date continuance (or to anything else) that is unrelated to any such witness. At issue is a mechanical, generic prerequi-

site unrelated to the establishment of a prima facie case, and required irrespective of the need for such a witness at trial.

*****

This is a pharmaceutical products liability and fraud lawsuit stemming from Petitioner Beverly Mann's use of the prescription sleep medication Halcion continuously for a two-year period beginning in January 1988, and ending in January 1990. The drug is manufactured and distributed by The Upjohn Company. During the period when Mann used the drug, the package insert authorized its use at .5mg., and also authorized its use for an indefinite period of time if the prescription was renewed every 30 days. The drug was prescribed for Mann by her internist at the time, Dr. John Karesh, initially at a dosage of .25mg and then, once the lower dosage had become ineffective for her, at a dosage of .5mg. Dr. Karesh told her (as he acknowledged in his deposition) that the drug had a very low incidence of side effects, lower than any other sleep medication available. He renewed the prescription for her every 30 days.

Since that time, the package insert has been significantly amended on several occasions, at the insistence of the Food and Drug Administration. The amendments to the insert include a substantially lowered recommended dosage of .125 mg, a warning against a dosage of more than .25 mg, and a warning against continuous usage for longer than 10 days. (According to an internal FDA memo dated July 22, 1992, the drug also should not be used in a dosage higher than .125 mg by persons of "small stature (100 pounds)," which Mann was.)

The amendments were mandated because the FDA was receiving reports of certain serious side effects associated with the drug at a rate many times higher than that for the other sleep medications available at the time (or available since then). The side effects that Mann suffered were among them.

Mann, a non-practicing attorney, filed the initial lawsuit *pro se* in Cook County Circuit Court in December 1991, six days before the statute of limitations arguably would run against Upjohn. Nearly two years earlier, when she saw an internist for severe illness with symptoms so odd that neither

Dr. Karesh nor another physician she saw could diagnose it, she was told that her use of Halcion likely was the cause or was a significant contributory cause. The physician, Dr. Joseph Griffin, told her that the drug had so high an incidence of serious side effects that in his opinion it should not be on the market. He also said the drug was highly addictive and that addiction to it could occur after only four consecutive days' use. And he said the drug was by far the most widely prescribed sleep medication in the country and that the drug's manufacturer had engaged in very aggressive marketing of it.

Until August 1991, Mann had harbored doubts about that physician's assessment. But that month internal Upjohn documents obtained in the discovery process in a Halcion lawsuit in Utah were made public and reported in the press. The documents confirmed what that physician had told Mann, and then some. In November 1991, Great Britain revoked its marketing license for the drug and announced startling statistics associating the use of it with numerous serious symptoms, including those Mann had suffered. Mann filed her lawsuit the next month.

She named Upjohn as the sole defendant, opting not to sue her prescribing physician. Upjohn invoked federal diversity jurisdiction to remove the case to federal district court, where it was assigned to (then) District Judge Ann C. Williams. At the first status hearing, the judge ordered Mann to submit a letter to Upjohn's counsel stating the nature and extent of her injury and declaring a monetary settlement demand. The judge also insisted that she retain counsel.

In preparation to comply with the first of those demands, Mann scheduled an appointment with a neurologist, Dr. Albert Ehle, who practiced with the Northwestern University Medical School Faculty Group and who, she was told by a receptionist there, had treated others suffering from Halcion-related side effects. Mann had chosen this medical group because her health insurance plan at the time used the Northwestern Medical Faculty physicians. She did not tell Dr. Ehle that she was involved in litigation stemming from her use of the drug; she said only that she wanted to know her

prognosis for full recovery and whether there was any treatment to eliminate her two remaining side effects. Thus he was a witness but not a paid one – a significant fact here.

In order to comply with the judge's latter demand, Mann retained an attorney named Paul R. O'Malley, a litigator experienced in pharmaceutical-products liability cases. O'Malley, like the other attorneys she contacted, insisted that Dr. Karesh be joined as a defendant; the joinder would destroy federal diversity jurisdiction and enable the lawsuit's voluntary dismissal and its refiling in state court, where O'Malley (and Mann) wanted it litigated. (Illinois law appeared to permit the physician's joinder under the statute of repose.)

O'Malley obtained a voluntary-dismissal order with explicit leave to refile in state court within 60 days adding as defendants Dr. Karesh and the HMO where he had treated Mann. At Upjohn's request, the dismissal order required that Mann respond to a lengthy set of interrogatories that Upjohn had served upon her shortly before. Contrary to the Appellate Court's statement, Mann responded to those interrogatories.

Yet no sooner was the lawsuit refiled than did Upjohn's lawyers serve her with another lengthy set of interrogatories. O'Malley objected on the ground that these were almost entirely duplicative of the ones already answered. The objection was not sustained, Mann was ordered to answer the interrogatories, and she did. No sanction of any type was issued *then, or at any other time in that litigation* – a seminal fact, because, as discussed below, the appellate court suggested otherwise and cited it as a primary basis for its denial to Mann appellate review of her substantive grounds for appeal. (App. C.)

Indeed, during the course of the litigation, Upjohn rained upon her one after another after another set of interrogatories, some of these sets containing approximately 200 interrogatories. Mann filed objections to them, sometimes on substantive grounds, sometimes on procedural grounds: Illinois Supreme Court Rule 213 bars the serving of more than 35 interrogatories without prior *express leave of court*, a provision that Upjohn repeatedly ignored. Time and again –

and again and again – Mann's objections to these sets of interrogatories were *sustained*, in rulings *denying* Upjohn's motions to compel Mann to answer them, and the sets of interrogatories were stricken in their entirely. The sets of interrogatories often were accompanied by lengthy sets of requests to admit (purported) facts, which Mann has described as running along the lines of "Admit that Halcion is the greatest wonder drug since the polio vaccine," and "Admit that Upjohn is the most altruistic organization since the Mother Theresa World Hunger Fund." She objected to every set of them, and every set was *stricken* on her objection. Every single set *in its entirely*.

Yet the appellate court said Upjohn was "forced" to file their motions to compel – the motions that were *denied*. The court thus denied Mann substantive appellate review.

In fact, the appellate court's implications notwithstanding, no discovery sanctions order was ever entered – against either party. Illinois Supreme Court Rule 219, titled "Consequences of Refusal to Comply with Rules or Order Relating to Discovery or Pretrial Conferences," provides in part that "[w]here a sanction is imposed ... the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order." The parties each filed (if memory serves) one or two Rule 219 motions. None was granted.

In sum, Mann was never found to have inappropriately failed to respond to discovery of any sort, to have inappropriately failed to answer requests to admit facts, to have violated the protective order in the case, or to have made false allegations of wrongdoing against her opposing counsel. Had she been, those rulings still could not have served as grounds for the denial of substantive appellate review; codified Illinois law (e.g., Rule 219) and state and federal constitutional due process guarantees would appear to bar that as a sanction. But she was not.

So the word "implied" is the more operative word in the phrase "implied representations". Hinting – as opposed to outright stating – was that court's tactic of choice, its path to

declining to consider Mann's substantive grounds for appeal. Hinting, as opposed to stating, that the trial court had entered particular orders that it did *not* enter, although in some of these instances the trial court actually had entered orders directly to the contrary. Hinting, as opposed to saying, that the trial court had in some other manner made particular findings that it did *not* make, although in some of these instances the trial court actually had made explicit findings directly to the contrary. Hinting, as its tactic for suggesting relevance of apparent irrelevancies – without stating why these things, even if accurate, would have been relevant. That court, in other words, inexplicably and with not even a nod toward explanation either implicitly reversed express findings of fact contained in trial-court orders or it held that that any allegation, any statement of purported fact contained in any motion filed with the trial court, and any facially neutral fact shown the court record could serve as *sua sponte* grounds for the denial of appellate review.

Thus employing this tactic calculated to mislead about the lower court's holdings, the appellate court refused to consider Mann's substantive grounds for appeal because the record on appeal contained motions filed by Upjohn's lawyers alleging certain facts about Mann's manner of litigating the case, and because Mann had accused Upjohn's lawyers of specific instances of impropriety – four instances of which, as reflected in the court record, those lawyers *acknowledged* yet denied constituted impropriety – and because the record reflected facially neutral occurrences to which the appellate court *sua sponte* ascribed a connotation that those facts neither had nor conceivably could have had.

Mann is not certain which of these two alternatives was the court's actual intend because it didn't say. But she challenges them both as violative of the Fourteenth Amendment's due process and equal protection guarantees.

A particularly stunning use of this tactic was that court's perversion of an incident in which Mann presented and then withdrew a motion for leave to name as a paid expert witness a Harvard University Medical School professor named

Quentin Regenstein, M.D., who had written extensively about Halcion. Mann had paid him $700 several months earlier to review and analyze her Halcion-related medical records and her deposition testimony, but for financial reasons she had resisted identifying him as a witness until pressured intensely to name a paid expert witness. At the hearing on her motion, Upjohn counsel Marie Woodbury blurted out that upon receiving Mann's motion she had assigned her associate to phone Regenstein and inquire about his opinion – an unequivocal violation of Illinois discovery and legal ethics rules (as Mann, stunned, pointed out at the hearing). Woodbury said Regenstein told the associate that he did not believe Mann's symptoms were caused by her use of Halcion. Mann withdrew her motion, saying that she needed to speak with Regenstein before proceeding with it. Later that day, she did speak with him, and he said the associate had given him specific information and then asked him his opinion. The information, however, was false. (The information concerned the timing of certain events that were the subject of lengthy litigation in which Mann filed two certiorari petitions with this court after successive appeals. Upjohn wanted to argue that those events rather than Mann's use of Halcion caused her medical symptoms.)

Upjohn did not claim the incident itself as pertinent to any issue on appeal. And Mann mentioned it only as part of her response to Upjohn's *counter-appeal*, which sought reversal of the denial of its summary judgment motion that claimed an insufficiency of evidence that Halcion caused Mann's illnesses. But Mann had memorialized the entire incident for the court record in a motion she filed shortly after it occurred, and a transcript of the hearing also was in the court record.

The appellate court's take on the incident – which, to reiterate, it cited as grounds upon which to deny Mann substantive appellate review: "On February 13, plaintiff filed an emergency motion to designate an opinion witness on causation, which plaintiff was later allowed to withdraw."

The appellate court cited as another of its grounds Upjohn's January 28, 1998, motion seeking "to have facts

deemed admitted based on plaintiff's failure to answer defendant's request for admissions." But the motion was *denied*. Mann established quickly, easily and, in fact (if she recalls correctly), without contest that the set of requests to admit were not sent to her (!). It turned out that a substitute secretary to the attorney responsible for mailing copies of *several* documents, which were filed with the court on December 27, had failed to include in the envelope a copy of the request for admissions. The envelope did include a summary judgment motion to which Mann responded *before* Upjohn filed its motion on the request for admissions, and a large set of interrogatories to which Mann also had responded – by answering some of them and *successfully* objecting to others – before Upjohn filed its admissions-motion.

Once Upjohn's motion to have the facts deemed admitted was *denied*, Mann promptly filed a blanket objection to the entire set of requests. The objection was sustained and the request, like the earlier ones, was *stricken*. Nor did Upjohn claim otherwise to the appellate court. As with the Dr. Regenstein incident, Upjohn did not mention it in the appeal.

And then there was the appellate court's *sua sponte* invocation of Upjohn's Rule 219 motion that claimed Mann had violated the protective order in the case. Mann had responded to that motion by invoking a specific exception provided in the protective order itself. The trial court agreed with Mann's interpretation of the protective order and *denied* Upjohn's motion, yet the appellate court cited that motion among its grounds for denying Mann substantive appellate review. And so on.

But the appellate court didn't mention this incident, although it was documented in the court record and Mann had mentioned it in one of her briefs: Mann learned during a deposition of a medical witness whom Upjohn had obtained a court order to use pursuant to a specific Illinois Supreme Court Rule, Rule 215, that Upjohn's counsel had ordered that witness to forward his notes to a physician who worked regularly for Upjohn's counsel's law firm so that the physician could secretly help draft the statement that the witness was

required by Rule 215 to submit. Rule 215 prohibits such witnesses from forwarding such notes and from communicating with lawyers for any party (or physicians acting on their behalf) before submitting the required statement. The witness stunned Mann and, visibly, Upjohn's counsel when he suddenly produced the faxed letter to him from counsel's associate requesting that he forward his notes to the law firm's physician, and copies of the follow-up faxes between him and that associate lawyer. Copies of those letters were in the record on appeal. And so on.

Nor – an equally seminal fact because, again, the appellate court implied otherwise and cited it as a basis for its decision to deny Mann substantive appellate review – was there ever any judicial finding, either oral or in writing, that Mann lacked sufficient evidence that the drug caused her physiological symptoms, and sufficient evidence of an intensive and broad disinformation campaign conducted by Upjohn about the safety and efficacy of the drug, to proceed to trial.

The appellate court did not itself purport to consider the sufficiency of the evidence; it simply hinted that the trial court had done so and had found the evidence insufficient. But actually, the trial court had found explicitly to the contrary. Time and again, in memorandum opinions *denying* Upjohn's repeated motions to dismiss and *denying* motions for summary judgment that had asserted an insufficiency of the evidence, and in a key (or so it seemed at the time) memorandum opinion *granting* Mann's motion for leave to amend her complaint to request punitive damages pursuant to 735 ILCS § 5/2-604.1, a statute provides:

> In all actions on account of ... product liability based on any theory or doctrine, where punitive damages are permitted no complaint shall be filed containing a prayer for relief seeking punitive damages. However, a plaintiff may, pursuant to a pretrial motion and after a hearing before the court, amend the complaint to include a prayer for relief seeking punitive damages. The court shall allow the motion to amend the complaint *if the plaintiff establishes at such hearing a reasonable likelihood of*

proving facts at trial sufficient to support an award of punitive damages....

Mann supported her motion with several boxes of documents (including deposition transcripts). The motion was argued at a lengthy semi-private hearing held in a small judicial conference room, as were most of the hearings in this case. (The significance of this will become apparent below.) On October 30, 1997, the court granted Mann's motion, in a memorandum opinion the trial read in part:

> In the present case, Plaintiff's evidentiary foundation for the standard enunciated by statute (the "reasonable likelihood" of proving facts at trial sufficient to support an award of punitive damages) is based on the documents produced by Defendant during discovery and the purported testimony of several independent investigators, including D. Michael Erspamer. *Plaintiff has submitted, both in deposition and documentation format, sufficient factual basis to support her allegations for punitive damages against this Defendant.* In short, when viewed in the light most favorable to Plaintiff, there exists a sufficient factual basis, if proven at trial, to support Plaintiff's position that punitive damages are warranted.... [The standard is] whether there is sufficient evidence to support Plaintiff's theory.... The underlying facts upon which Plaintiff relies have been garnered from the documents produced by Defendant .... The issue of Defendant's purported policy regarding the development, testing, and marketing of the drug at issue has been argued extensively in the voluminous motion practice which has transpired before this court. *The documentation and deposition testimony relied on by Plaintiff are the fruits of aggressive discovery engaged by these parties* and the issues and the theories presented by Plaintiff have been evident throughout the discovery process.... [Emphasis added.]

Upjohn filed a cross-appeal from the denials of its motions to dismiss and for summary judgment but did not appeal from the grant of Mann's § 604.1 motion.

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After Mann's deposition was completed in 1995, the defendants each filed summary judgment motions asserting the running of the statute of limitations. The initial trial date, which was scheduled automatically by a computer, was continued by agreement of the parties to December 5, 1996, because the defendants wanted the summary judgment motions decided before a trial date was set and because the parties did not want to proceed with further discovery before the motions were decided. In February 1996, after extensive briefing and two extended oral arguments, Upjohn's motion was denied and the other defendants' motions were granted. At O'Malley's request, the order granting the summary judgments was not made final and appealable.

Dr. Karesh's deposition had been taken in 1995. Although then still a defendant in the lawsuit, he testified that Mann's illnesses may have been caused or exacerbated by Halcion. In May and June 1996, the depositions of Drs. Ehle and Griffin and another of Mann's treating physicians was taken.

In May 1996, the FDA released a long-awaited investigative report called "The Halcion Task Force Report." The FDA had commissioned the Task Force under public pressure after the surreptitious release by an about-to-retire FDA whistleblower named D. Michael Erspamer in 1994 of the report he had written (and the supporting documents he had compiled) on Halcion as an FDA investigator two years earlier, a report that the agency had buried.

Mann played a role in the springing of the 1996 Task Force Report from the private sanctums of the FDA. (The significance of this will become apparent below.) She enlisted the assistance of a *Wall Street Journal* investigative reporter named Laurie McGinley, who sometimes covered the FDA; (See letters dated May 20, 1996, and May 31, 1996, from Mann to McGinley, at App. D and App. E, which discuss this.) Mann coordinated her effort with veteran Halcion

litigator Michael Mosher, the Texas lawyer mentioned by the Appellate Court in its opinion, who was enlisting the assistance of his local congressman, Rep. Joe Barton, who chaired the House subcommittee that oversees the FDA. The bound report, released on May 31, 1996, and bearing the release date of May 29, 1996, was 70 pages long and had separate bound appendices of several hundred pages, provided smoking-gun statistical evidence as well as evidence of Upjohn's machinations within the FDA concerning the licensing of the drug and the safety warnings for it. According to Barton, it actually had been completed approximately a year earlier; the FDA simply had refused to release it earlier.

Also in May 1996, Upjohn filed three summary judgment motions. One alleged the adequacy of Upjohn's warnings during the relevant time period. Another asserted that because Dr. Karesh (on the advise of his attorney) had declined at his deposition to "speculate" about whether he would have prescribed Halcion for Mann had the drug's warnings back then been as they were at the time of his deposition, Mann could not prove a causal relationship between inadequate warnings and her use of the drug. The third, irrelevant here, concerned a narrow aspect of the claim for economic loss.

Also that month, Upjohn issued a slew of deposition subpoenas and served Mann with one of its huge sets of interrogatories accompanied by a huge set of requests for admissions. Among the subpoenas was one for the deposition of the ex-husband of one of Mann's two sisters, who has lived in Denver since 1969 and is long divorced from Mann's sister. (Mann has never lived in Colorado.) Another was for Mann's law school transcripts. Etc.

In June 1996, fed up with Upjohn's discovery excesses and with her own lawyer's *liassez faire* reaction to them (he was angry and agreed it was well beyond the norm and deliberately oppressive, but thought it was easier to comply with them than to litigate each one), Mann parted ways with him in order to contest each discovery demand she considered inappropriate. She filed *pro se* motions to quash seven or eight subpoenas, and, in response, all but two of the subpoenas *were*

quashed. (A lawyer for the University phoned Mann upon receiving the subpoena and offered to contest it on the school's behalf and on Mann's, but Mann took care of it; Upjohn withdrew the subpoena for her law school records when Mann raised the matter informally at a hearing, before she even filed a motion to quash it.)

Meanwhile Mann and, earlier, O'Malley gathered huge volumes of pertinent Halcion-related documents – from the FDA, from court records in other Halcion litigation, and from Upjohn itself – that supported her allegations. Eventually this included (1) a several-volume deposition of a key Upjohn whistleblower, Dr. William Barry, who had authored several internal Upjohn documents warning of "scary side effects" from the drug and advising against pursuing FDA approval for of it, (2) trial and deposition testimony of other Upjohn executives admitting that they had written certain key internal memos uncovered by FDA investigator Erspamer, (3) a several-hundred-page deposition of Erspamer, (4) internal Upjohn memos detailing Upjohn's purchase of favorable reports by ostensibly independent experts, (5) internal Upjohn memos detailing Upjohn's strategy of discrediting critics of Halcion, and (6) internal Upjohn memos describing the company's tactics of intimidation that killed negative news-media reports about the drug, including a planned expose on PBS and another one on CBS.

Mann also tentatively arranged for the testimony of an FDA epidemiologist named Diane Wysowski, PhD., who had written a lengthy, detailed statistical analysis that compared the reported incidents of specific neurological and psychiatric side effects from Halcion and from each of the other two best-known sleep medications of the 1980s. Wysowski had written the analysis originally as part of her job at the FDA, and then had it published in *The Archives of Internal Medicine*, which is where Mann came across it while researching at the Crerar Library of Health Sciences at the University of Chicago in preparation to respond to the summary judgment motion concerning the adequacy of the warnings. The statistics in the article showed that the rate of incidence of a few of the side

effects was several hundred times greater from Halcion than from the other two medications, and that the incidence of some of the other side effects was tens of times greater from Halcion. Wysowski agreed to testify, free of charge (traveling expenses only), provided that her FDA supervisor approved it.

Meanwhile, extensive pertinent Upjohn internal documents and FDA documents were slowly being uncovered through the discovery process in various other Halcion lawsuits around the country. And in July, 1996, shortly after Mann assumed her own representation, she read an article published in the July 22, 1996, edition of *The National Law* Journal bearing the title, "Upjohn Asks High Court To Protect Halcion Info Megadocument data base is attorney "work product.'" The article, which played a key role in the remainder of the litigation, read in part:

> In a high-stakes discovery battle over what constitutes work product, the Upjohn Co. and its defense counsel have asked the U.S. Supreme Court to reverse a Connecticut court ruling that gave a plaintiffs' attorney access to a million-document database on the sleeping pill Halcion.
>
> The Nov. 22, 1995, ruling by New London County Superior Court Judge D. Michael Hurley ordered Upjohn's law firm, Kansas City, Mo.'s Shook, Hardy & Bacon L.L.P., to turn over to the plaintiff a document index and accompanying data base. Citing the work product privilege, Upjohn appealed through the Connecticut courts without success and in May filed a petition for a writ of certiorari to the U.S. Supreme Court. The plaintiff's reply came in June; a decision on cert is not expected until the fall term. Scovish v. Upjohn Co. ... (Super. Ct., New London Co.).
>
> Plaintiffs' attorney Angelo A. Ziotas, of New London's The Reardon Law Firm P.C., brought the underlying suit against Upjohn, alleging Halcion was defective and had caused the 1991 suicide of Walter Scovish, a 59-year-old construction worker. In the course of discovery, Mr. Ziotas learned of the database and sought access to it.
>
> The documents, which total more than 1 million, include clinical data, internal memos and correspondence

> that relate to Halcion, which has come under fire in the courts and at the Food and Drug Administration. On May 29, the FDA suggested in a report that the Justice Department investigate whether Upjohn had concealed Halcion safety concerns. Upjohn, facing 155 lawsuits over the drug, insists Halcion is safe....
>
> Judge Hurley rejected Shook Hardy's claim that ordering the release of the database would violate the work product privilege. "The development, testing, manufacture and governmental review of this drug, as the discovery battles of this case demonstrate, produced hundreds of thousands of documents that the plaintiff has a right to review," Judge Hurley ruled....
>
> Mr. Ziotas said he hopes to share the documents with colleagues. He is the chairman of the Association of Trial Lawyers of America's Halcion Litigation Group.

Mann obtained Mr. Ziotas' promise to provide her with copies of all the documents, at a cost to her of $.05 per page, if this Court denied Upjohn's *certiorari* petition.

In August, 1996, when it appeared that Mann was about to win a major victory on a discovery issue, Upjohn moved successfully for reassignment of the case to a special complex litigation subsection of the County court system's Law Division. The case was assigned to Judge Susan Zwick, who, under the structure of the Law Division was to preside in the case until trial, ruling on all pretrial motions of any type *except motions for trial-date continuance*. It was Judge Zwick who, in a series of rulings immediately following the reassignment of the case to her, granted Mann's motions to quash the above-mentioned subpoenas and motions to strike the several sets of interrogatories and requests to admit. (She later granted others as well, as Upjohn kept serving Mann with voluminous sets of those things.) It also was Judge Zwick who ruled on the sufficiency-of-evidence motions mentioned above, including Mann's 735 ILCS § 5/2-604.1 motion.

For motions for trial-date continuance, the Law Division had a separate set of judges – a cadre of five, headed by the

Chief County Judge, Donald P. O'Connell (a key player in this saga). Informally called "the 2005 judges" (so dubbed for one of the two courtrooms where they heard these motions), they met in chambers each morning before the motion call, quietly and unofficially, to receive generic instructions from O'Connell about how to rule on these motions – motions that had not yet been presented to or seen by any judge (including O'Connell). At the meeting, O'Connell would assign himself or another of the five to hear the motion call – usually a call of roughly 40 motions – each morning. The motions were neither briefed nor provided to the judge before the motion was called. The hearing on each motion lasted a few minutes.

At the heart of the appeals in the lower courts were repercussions from a dichotomy between O'Connell's generic policy instructions and codified Illinois law, and between those policy instructions and specific written sufficiency-of-evidence findings by Judge Zwick in Mann's case. Mann argued to the trial court and on appeal that those repercussions implicated Fourteenth and Seventh Amendment rights (as well as state constitutional rights).

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Mann had planned to retain counsel again after the rulings on her motions to quash and to strike, and after what she presumed would be the denial of the two summary judgment motions relevant to this petition. But in the fall of 1996, although discovery was proceeding in the case, there was delay regarding the summary judgment motions.

There also was delay in Upjohn's turning over to Ziotas the database in the *Scovish* case; specifically, Upjohn continued to withhold it under the guise of working out the arrangements. Eventually (in late November, if Mann recalls correctly), Ziotas filed a motion demanding an end to the delay. The motion was granted but the delay continued.

On October 22, 1996, Mann moved to continue the trial date from December 5, citing the apparently imminent production of the Halcion database to Ziotas and his promise to Mann, and the ongoing and active discovery in her case, and her need for trial counsel after the (presumed) denial of

the pending summary judgment motions. She presented her motion to Judge Jacqueline Cox, the 2005 judge assigned to hear the motion call that morning. Upjohn's local counsel objected on the grounds that Mann had not retained a paid medical expert and had not, herself, taken any depositions – points certainly by appearances irrelevant to the grounds Mann had asserted in her motion and seemingly precluded by the express language of 735 ILCS § 5/2-1007, the statute that governs trial-date-continuance motions. That statute provides: "On good cause shown ... additional time may be granted for the doing of any act or the taking of any step or proceeding prior to judgment. The circumstances, terms and conditions under which continuances may be granted ... shall be according to rules."

Another provision in the Illinois Code of Civil Procedure, 735 ILCS § 5/1-104(a), provides in part, "Unless otherwise indicated by the text, references in this Act to rules are to rules of the Supreme Court." The only Illinois Supreme Court Rule pertinent to § 5/2-1007 is Rule 231, which materially pertains only to motions for trial date continuance in order to procure additional "material evidence," and which requires a showing of due diligence only in attempting to procure *that evidence*.

Mann responded to the objection by noting its irrelevance and by rattling off the extensive evidence – internal Upjohn memoranda, FDA documents, transcripts of testimony of Upjohn executives given in other Halcion cases, etc. – that she had obtained. Yet Judge Cox denied Mann's motion, enunciating a court policy requiring plaintiff movants to prove due diligence in prosecuting the lawsuit and measuring due diligence solely by the number of depositions taken by the plaintiff and by the plaintiff's designation of at least one paid opinion witness. It was a statement of court policy reiterated to her again and again, by one after another of the 2005 judges. Eventually it became clear – at a hearing on November 4, 1997, before Chief Judge O'Connell – that O'Connell himself had promulgated the policy.

It is this policy of defining due diligence in a manner divorced from the actual evidentiary needs in the particular

case and pegged instead purely to the plaintiff's out-of-pocket monetary expenditure that Mann challenges as violative of the Fourteenth Amendment's due process and equal protection clauses. Mann challenges as unconstitutional the mechanical prerequisites of these huge monetary expenditures, whether as a precondition to trial-date continuances or to trial itself. Mann paid approximately $22,000 to litigate that case, but it wasn't enough to meet the court's minimum-expenditure test.

These requirements correlate necessarily to monetary expenditure and not necessarily to anything else – which, as Mann discusses below, appears to be their very purpose. Certainly their effect is to concentrate plaintiff's medical-malpractice and pharmaceutical products-liability litigation in the hands of a handful of very wealthy and influential personal injury lawyers, who, as Mann showed at a hearing during a bizarre foray into federal district court on this issue in this case, can and do obtain trial-date continuances upon simple demand and who also play significant roles in the election and retention of these judges.

Mann filed a motion for reconsideration in which she scathingly challenged the policy as inconsistent with § 5/2-1007 and with the Fourteenth Amendment and with a provision of the Illinois state constitution that guarantees due process and equal protection of the law. She scheduled the motion for hearing on October 29, but several days earlier provided a courtesy copy of it to the 2005 chambers.

Judge O'Connell assigned himself to hear the motion-call that day. When the motion was called, he said he had arranged to have Judge Cox hear it in chambers. A few minutes later, when Mann and Upjohn counsel Marie Woodbury, a partner at Upjohn's national Halcion–litigation law firm based in Kansas City, Mo., arrived at chambers, two female County sheriff's deputies (who Mann learned later were supervisors who did not normally man courtrooms) flanked Mann. Judge Cox initially denied Mann's motion, on the reiterated grounds that Mann had not met the two due diligence prerequisites for a trial-date continuance. Mann then read aloud her two letters to *Wall Street Journal* reporter Laurie McGinley and held up a

bound copy of the FDA's Halcion Task Force report bearing the release date of May 29, 1996; she argued that her role in the release of the report a year after its completion surely demonstrated her due diligence – as, she said, did her compilation of voluminous other documents, including transcripts of depositions of FDA personnel and of Upjohn executives (past and then-current) taken in other Halcion litigation.

Mann also read aloud the entire *National Law Journal* Halcion-database article and detailed her conversations with attorney Ziotas. To Mann's astonishment, Ms. Woodbury contradicted the representations that Ziotas' had made in the *NLJ* article and to Mann that there was no protective order in *Scovish* barring his transmittal of copies of the database to Mann or to anyone else. Woodbury said she had attended the hearing at which the *Scovish* database motion was granted and that such a protective order was issued at the hearing. Judge Cox nonetheless reversed herself and granted Mann's motion, continuing the trial date to August 21, 1997. It was the only lengthy trial-date continuance Mann received, and it would have been sufficient had Judge Zwick not granted Upjohn summary judgment (temporarily, as explained below) on February 23, 1997.

Immediately after the October 29 hearing, Mann spoke with Ziotas, who said Woodbury had lied. Mann obtained a transcript of the *Scovish* hearing directly from the court reporter and forwarded a copy of it to Woodbury, who in a letter to Mann dated November 6, 1996, *acknowledged* that no such protective order was entered; she said Upjohn had filed a motion to have an earlier protective order that covered specific other documents made applicable to the database. Mann placed the *Scovish*-hearing transcript and a copy of Woodbury's letter into the court record, but apparently the appellate court didn't notice these when it romped *sua sponte* through the record on appeal looking for utter irrelevancies upon which to base its denial of appellate review of Mann's substantive bases for appeal.

As for the two supervisory sheriff's deputies, they mysteriously materialized at subsequent hearings in the case

before Judge Zwick, who at the key hearing, in January, 1997, on Upjohn's still-pending summary judgment motions ordered them to wait outside the conference room because their presence was upsetting Mann. After that hearing, Mann filed a formal complaint with the Sheriff's office, and these deputies never again appeared at a hearing in the case. Months later, though, another set of sheriff's deputies appeared at a key hearing, and followed Mann as she walked through the court building after the hearing (as had the first set of deputies, after the hearings at which they had appeared). Eventually, Mann learned that it was Chief Judge O'Connell who had ordered the presence of all these deputies at the various hearings.

As for the Halcion database, Upjohn's motion for protective order was denied. Upjohn dallied in producing until given a court ultimatum to do so. It then settled *Scovish* in order to avoid complying with the production order. Included in the settlement was a provision barring Ziotas from handling any other Halcion lawsuit and barring him or anyone from his office from speaking to Mann again. Ziotas' paralegal, with whom Mann had spoken on several occasions told Mann this, and told her that she was not supposed to tell her this or to speak with her at all.

So Mann sought the database on her own, in a months-long battle during which, in July, 1997, she accused Upjohn lead national Halcion trial counsel Stephen Scheve of feigning eye surgery in order to run out the trial-date clock before a ruling on Mann's production request, an allegation that the Appellate Court called inexcusable. Judge Zwick ultimately granted Mann's motion to compel the production of the database, and Upjohn produced the database to her on 69 computer disks. She was the only Halcion plaintiff to actually obtain the database. The appellate court, in refusing to consider her substantive grounds for appeal – including her challenges to the policy of equating due diligence with the number of depositions taken and the designation of a paid opinion witness – cited Mann's eye-surgery accusation as a ground for its refusal. Scheve had indignantly insisted that he indeed has had eye surgery, but he produced no tangible

evidence of it and, contrary to the appellate court's inference, there was no judicial determination of fact about it (mainly because it was just a passing incident, hardly a significant controversy). The appellate court did not explain why it thought Mann's allegation gave it a ground to refuse to consider the merits of her appeal.[1]

On February 25, 1997, Judge Zwick entered summary judgment in Upjohn's favor on the only two counts in the complaint against Upjohn.. Her stated grounds: Dr. Karesh at his 1995 deposition refused at the suggestion of his attorney to answer O'Malley's question concerning whether or not his recommendation for treatment of Mann would have been different had the Halcion package insert in 1987-89 been the same as it was at the time of his deposition. His attorney had objected to the question, saying, "Calls for speculation," so he answered, "Perhaps. I can't say." The judge said Mann thus could not prove "to a reasonable degree of medical certainty" that her use of Halcion – continuously for two years in dosages of .25 mg and .5 mg – would have been different had the warnings at the time she used the drug been the same as the warnings at the time of Karesh's deposition. The judge also ruled that Illinois's so-called learned intermediary doctrine eliminated Upjohn's duty to provide accurate and

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[1] By then, Scheve's credibility among Halcion litigants was strained. He had written a rather infamous letter in 1994 to attorney Michael Mosher threatening Mosher with a copyright-infringement lawsuit if he disseminated Halcion-related Upjohn internal documents Mosher obtained from the court file in an early Halcion case in Utah. Mosher had responded – accurately – that the federal court in that case had ruled the documents *unprotected* by copyright law. Mann filed copies of that correspondence as exhibits in her case. Mosher also had alleged in court papers he filed in 1994 in a Halcion case that Scheve, before producing key Halcion documents to Mosher, rearranged the pages of some of the documents so they were indecipherable. Mann filed a copy of that document as an exhibit, too.

adequate information about the drug to Dr. Karesh for disclosure to Mann so that Mann herself could make an informed decision about whether to use the drug.

Mann filed a motion for reconsideration. When that was denied, she filed a motion for leave to file amendments to the complaint adding several counts alleging fraud, negligence, strict liability and battery; this procedure is permitted under 735 ILCS § 5/2-1005(g). On April 22, 1997, Judge Zwick granted the motion, rendering the February 25, 1997, summary judgments interlocutory and not immediately appealable. It was Upjohn's turn to move for reconsideration, which it did, asserting an insufficiency of the evidence. The motion was argued in depth and ultimately denied, in a detailed memorandum opinion issued on June 5.

Immediately afterward, Upjohn resumed inundating Mann with new discovery demands, and it filed another summary judgment motion, this one arguing specifically that as part of her *prima facie* case Mann needed a paid physician to testify that the Halcion *had caused* her illnesses, and that her failure to designate such a witness entitled Upjohn to summary judgment. The trial was still scheduled to begin on August 21, so on July 1, Mann moved for a trial date continuance on the basis that she had lost the three and on-half crucial months when the case was effectively dismissed – time that under the circumstances was crucial. She also said she badly needed to retain counsel because she could not continue to respond to Upjohn's nearly daily discovery and motion demands; she said, accurately, that Upjohn was serving her with documents by Fed-Ex and by local messenger service at all hours of the day and late into the evening and that it was beginning to make her physically ill.

Upjohn's local counsel, well familiar with the O'Connell policy, responded citing Mann's "lack of due diligence" in failing to take depositions and to name a paid opinion witness. Mann's motion was denied, on those stated grounds, over Mann's protestations that she *did not need* more deposition testimony or a paid witness in order to prove her case.

Meanwhile, Mann responded to the summary judgment motion, partly by quoting Federal Rule of Evidence 702 and its Advisory Committee Notes and arguing that that Rule and its Notes actually reflect due process requirements – an argument she repeated on appeal and that she reiterates here. "What's left for the jury, then," Mann asked rhetorically, "if opinion testimony not that the drug *could have* caused the illnesses but that it *did cause* the illnesses is required before a plaintiff can get her case *to* a jury?" She noted that she already had Upjohn's admission in a variety of documents (including in the updated Halcion package insert) that the drug *could* cause those illnesses, and she had the extensive statistical evidence from the FDA and from Upjohn itself. Judge Zwick agreed, and in a memorandum order issued on July 31, 1997, *denied* the summary judgment motion.

Mann renewed her motion for trial-date continuance, eking out a series of short continuances enabling her to respond to Upjohn's latest (and unceasing) discovery demands but not allowing her the extension she needed – a minimum of three months – that would have enabled her to retain trial counsel. At a hearing in late October, when she noted to the judge – Judge Cox – that every trial-date-continuance motion presented thus far that morning was granted except hers, some on cases older than hers, the judge said outright that she and her colleagues were "not averse" to trial-date continuances but that Mann had not met the two due diligence prerequisites.

The next day, Mann filed the federal-court civil rights petition that she mentioned above. The district judge's comments at the one hearing in federal court, on October 30, which were sympathetic to Mann's position, persuaded Judge O'Connell on November 4 to continue the trial date, and he also assigned the case for trial to Judge Zwick, who scheduled the trial for a date in February. Mann arranged for trial counsel, but Zwick then advanced the pretrial schedule by several weeks, and so Mann's trial counsel reneged. That lawyer, who was based in Boca Raton, Fla., was litigating a major Halcion case in California, *Norgart v. The Upjohn Co.*, 21 Cal. 4th 383, 981 P. 2d 79 (1999). Mann flew to Florida to

meet with him, and had mentioned her plans to Scheve at a hearing the day before. When she arrived at that lawyer's office, he told her that Scheve, who also was lead Upjohn counsel also in *Norgart*, had phoned him that morning to try to dissuade him from representing Mann, telling him that Mann would sue him for malpractice. Mann related the incident at a hearing shortly afterward at which Scheve was present. He didn't dispute the account. A transcript of the hearing was in the record on appeal, as was a document Mann filed in which she described the incident. The appellate court must have missed these while foraging through the record.

Another law firm then asked Zwick to reschedule the trial date to enable that firm to represent Mann, but Zwick said she was given instructions - "from on high" not to do so. In February, Zwick did reschedule the trial for April, but Mann was unable to retain trial counsel for it. In mid-March, she notified the judge and Upjohn's counsel that on the scheduled trial date she would request a dismissal for want of prosecution because she could not try the case *pro se*. She did that. Then, also as she had said she would, she quickly filed a motion to vacate the dismissal pursuant to 735 ILCS § 5/2-1301(e), which allows for this. The motion was denied.

Mann appealed from the summary judgments, from the repeated denials of her motions for a single trial-date continuance of sufficient length to enable her to retain trial counsel, and from the denial of her § 5/2-1301(e) motion. Upjohn cross-appealed from the denial of its sufficiency-of-evidence summary judgment motion.

During the appeal, Mann filed two judicial-refusal motions, both of which were *granted*. Mann filed both motions because the judge at issue was a former trial-court judge who was appointed by the Illinois Supreme Court at the recommendation of Judge O'Connell to fill a vacancy created on the appellate court by a mid-term retirement. (The second of the two, Judge Judith Cohen, had been a 2005 judge, and was the only current 2005 judge who had never ruled on any of Mann's trial-date-continuance motions, but she had attended the daily morning in-chambers conferences. She also

was the head of the Law Division at the time, appointed to that post by O'Connell. In a July, 1998, cover profile of her in the journal *The Chicago Lawyer*, Cohen said she owed her career to O'Connell, whose friendship with her dated to before she began law school.) Immediately after Cohen's recusal, the appeal was reassigned to another Division of that court, and assigned to the panel headed by Justice Anne Burke, husband of Chicago City Counsel Finance Committee Chair Edward Burke, the Democratic Party' longtime local judicial slate-maker. See *Chicago Sun-Times* article at App. F. Justice Burke wrote the appellate opinion, including its use of Mann's judicial-recusal motions as a ground for the denial of substantive appellate review. Her panel colleague Justice Warren Wolfson is featured in the article, too, at App. F 7.

One day before the issuance of the opinion, O'Connell publicly announced his retirement from the bench at age 58, in the middle of his term as chief judge and in the middle of his judicial term.

As Mann has stated above, that court refused to consider her appeals from the summary judgments, and refused to consider her statutory and constitutional challenges to the monetary-expenditure standard for determining trial-date continuance motions. It did consider her appeal from the denial of § 5/2-1301(e), but nothing else.

Invoking Illinois State Constitution, Art. VI, sec. 4(c), which reads, "Appeals from the Appellate Court to the Supreme Court are a matter of right if a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court ...," and Illinois Supreme Court Rule 317, Mann filed an appeal with the Illinois Supreme Court concerning the appellate court's refusal to consider her appeals from any but the denial of her § 5/2-1301 motion.

She argued, as she does here, that the appellate court lacked the legal authority to refuse to review the propriety of the summary judgments and the denials of her motions for trial date continuance, and that it's doing so denied her due process and equal protection of the law. And, most

significantly, she argued, as she does here, that that court lacked the legal authority to *determine issues of fact* concerning procedural matters that were disputed in the trial court, effectively *reversing* a slew of trial-court findings concerning those disputed facts, and then in classic *non sequitur* fashion premising rulings concerning *unrelated issues* upon those reversed findings of fact; she argued that its doing so denied her due process of law. She argued, alternatively, that the appellate court lacked the legal authority to base *any* ruling whatsoever upon the fact that Mann had availed herself of the laws permitting judicial recusal motions and objections to discovery demands, the latter which is an exceedingly common practice in litigation and certainly one that has never been (nor logically or legally could be) grounds for a finding of waiver of substantive appellate review or anything else unrelated to the merits of the objections. She contends that these were *ultra vires* acts and as such denied her due process and equal protection of the law.

Jointly, she filed a petition for discretionary Supreme Court Review pursuant to Illinois Supreme Court Rule 315(a), asking the court to consider whether the trial court's stated policy of the mechanical *de facto* monetary-expenditure test for trial-date continuances, unrelated as it is to the actual *prima facie* evidentiary needs of the case, violates the Fourteenth Amendment's due process and equal protection clauses and Art. I, sec. 2, of the Illinois state constitution. She also asked the court to consider whether the stated policy of the trial court to mechanically require the testimony of a paid opinion witness on the ultimate issue of causation in the case violates the Seventh Amendment's provision of the right to trial by jury. And she asked it to consider the propriety under the Illinois constitution and the Fourteenth Amendment, Sec. 1, of the trial court's refusal to comply with the mandate of 735 ILCS § 5/2-1007.

That Court on December 5, 2001 rejected the appeal, and notified Mann in a letter that (the mandate of Art. VI, sec. 4(c) notwithstanding) read, "The Supreme Court today DENIED the petition for appeal as a matter of right or leave to appeal in

the above entitled cause." (App. B.) Mann filed a motion for reconsideration in which she argued, as she does here, that that court's noncompliance with state constitutional mandate itself was an *ultra vires* act and thus a denial of due process – that an enunciated right conferred by a state constitution or state statute creates a due process property interest in those to whom it pertains, a right that cannot be so casually abridged.

SUMMARY OF ARGUMENT

Mann's arguments are summarized in the three paragraphs immediately above. Here, in arguing that appeals courts simply lack the legal discretion to act beyond the legal authority prescribed to them by law, she cites *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); she posits that such *ultra vires* acts on the part of state appellate and Supreme courts violate the Fourteenth Amendment's due process clause. In arguing that the Fourteenth Amendment's equal protection clause requires state appellate courts to apply particular state law (in this instance, narrowly tailored, precise state statute and constitutional mandate) in all cases in which that law is applicable, she cites *Fiore v. White*, 121 U.S. 712 (2001), in support. And in arguing that the Illinois Constitution's Art. VI, sec. 4(c), confers a Fourteenth Amendment property interest in the consideration by the Illinois Supreme Court of the federal and state constitutional issues that arose for the first time in and as a result of the action of the Appellate Court, she cites *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972), and *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694 (1972). She also notes the discussion in *Thielman v. Leean, et al.*, 282 F.3d 478 (7th Cir. 2002), concerning the source of due process rights: "Liberty interests can arise from two sources: the Federal Constitution or state law...."

She argues that the court's compliance with codified state law is not discretionary but mandatory, and that this is what is at the heart of the concept and the promise of the rule of law.

She also argues that appellate courts lack the legal authority to determine disputed issues of fact, including

disputed issues of *procedural fact regarding the conduct of the lawsuit* as the appellate court did wholesale in this case. Partly, this is because those courts simply lack the *apparatus* to serve as fact-finding courts. She references a discussion on this point in *Finer Foods, Inc. v. U.S.D.A.*, 274 F.3d 1137 (7th Cir. 2001). She argues that *absent a fact-finding procedure in compliance with due process*, any fact-finding by any court, whether a trial court or an appellate court, violates the most obvious and fundamental of due process guarantees.

She also argues that appellate courts lack the legal authority to deny appellate review upon whim (e.g., on flagrant *non sequiturs*) when, as here, that appellate review is mandated by the state constitution and is regularly accorded to appellants, and that the court's doing so violates the Fourteenth Amendment. In support she cites *Daniels v. Williams*, 474 U.S. 327 (1986); *Lindsey v. Normet*, 405 U.S. 56 (1972); and *Bounds v. Smith*, 430 U.S. 817 (1977). She argues that the Illinois Supreme Court's designation of her appeal as one not of right but as a *petition for appeal as a matter of right* is an oxymoron; legal rights, by definition, may be exercised without the need to petition to exercise them. Surely there is a line beyond which the cavalier disregard of codified state law violates the Fourteenth Amendment, and the court in this instance crossed it.

And she argues, most vigorously, that appellate courts lack the legal authority to deny appellate review to, or in fact to take *any sanction whatsoever* against, a party *for her having properly invoked codified procedural rules*, whether in the discovery process or otherwise. She argues that the due process and equal protection clauses prohibit such caprice. She also notes the absurdity of the appellate court's having cited her judicial-recusal motions as grounds upon which to deny her appellate review; she references *U.S. v. Microsoft* Corp., 253 F.3d 34 (D.C. Cir. 2001), and *Sao Paulo State v. American Tobacco Co*, Inc., 535 U. S. ___(2002), and notes that neither Microsoft nor American Tobacco was denied appellate review of their substantive claims because they had moved for judicial recusal.

And she argues, not least, that due process requires that any evidentiary prerequisite to trial, whatever form the prerequisite takes, be based upon the *prima facie* needs in the specific case – upon the sufficiency of the evidence obtained in *that case* – and not upon a blanket court policy concerning *the manner and cost of obtaining* the necessary evidence. She also argues that Federal Rule of Evidence 702 and its Advisory Committee Notes articulate not just a federal procedural rule but also due process truth. She also argues that the mechanical (and legally asinine) requirement that discovery be obtained through deposition testimony taken in that case rather than through other documentary means also violates due process, and that because of their monetary expense both these requirements irrationally deny equal protection as well. She notes the pivotal role that the massive volumes of internal corporate documents have played in the tobacco litigation of recent years, partially the documents made available on the Internet for free; reference *Baker v. General Motors Corp.*, 118 S. Ct. 657 (1998).

REASONS WHY THE WRIT SHOULD BE GRANTED

Mann has contended throughout the opinion-witness controversy in this case that it presents, in effect, the flip side to the issue this Court addressed in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). In *Daubert*, and later in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), this Court considered, albeit under a Federal Rule of Evidence 702 analysis rather than under a due process or equal protection or Seventh Amendment one, minimum qualifications for opinion testimony by an expert. She asks this Court to consider now whether a trial prerequisite of paid opinion testimony that is unnecessary to the prima facie case itself violates due process and equal protection guarantees and (in applicable cases) the Seventh Amendment's right jury determination. She asks this Court to determine whether, as she believes, the following comments in the Advisory Committee Notes to Federal Rule of Evidence 702 actually state an evidentiary due process rule:

> Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. . . . [O]pinions are not indispensable, [thus the Rule encourages] the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite inference.

State courts (certainly Illinois state courts) have, to a constitutionally inappropriate extent, delegated the civil justice process to highly paid opinion witnesses, mindlessly requiring these witnesses as a matter of course; see, e.g., *Mengelson v. Ingalls Health Ventures*, 323 Ill. App. 3d 69; 751 N.E.2d 91 (1st Dist., 2001). One result (as Mann notes in her Statement of the Case) is the consolidation of certain types of law practice in the hands of a small cadre of very wealthy lawyers. Another effect is that litigation in complex cases involving non-catastrophic injury is, without legitimate reason, becoming, for many, beyond monetary reach.

As for her request that this Court consider the other, larger, more complex Fourteenth Amendment thread of this petition: Mann has interwoven her arguments throughout – in her recitation in her Statement of the Case and (in more than summary fashion, she supposes) in her Summary of Argument. The specifics of her case concerning these due process and equal protection claims surely are unusual, but the free agency of state appellate and supreme courts, which is at the heart of those claims, apparently has become remarkably commonplace and remarkably casually accepted. Those courts, which can and do issue writs of mandamus and other legal orders to other government bodies, are themselves subject only to writs from this Court, and only a clarification by this Court that the state courts are subject to the parameters of their legally-prescribed authority will stem the tide of this free agency.

Respectfully submitted,
Beverly Mann

Chicago Sun-Times

WHO KNEW? KEY TO BECOMING JUDGE IS WHO YOU KNOW

April 29, 2003

BY **Legal Affairs Reporter**

A two-year, $100,000 study by a Chicago public interest group confirms what critics have charged for years: Clout and money, not legal ability, are the main factors determining who gets elected judge in Cook County; or, a ward boss in the hand is worth a newspaper endorsement in the bush.

"Some of the most important factors in getting elected judge are getting slated and getting the money to get slated," said David Melton, president of the Chicago Council of Lawyers. "We think that's unfortunate. We think the emphasis should be on people's qualifications to be judge."

The Council's Chicago Appleseed Fund For Justice contracted with two professors from Washington University in St. Louis to analyze the results of every judicial primary and general election in Cook County since 1988.

The professors found that a lawyer running countywide for judge without the blessing of the Cook County Democratic Party's central committee had only a 5.8 percent chance of winning. If they received the coveted "slating" of the Democratic ward bosses, their chances increased to 68.4 percent.

In the judicial "subcircuits" created in 1992 to elect more minorities from 15 smaller districts within Cook County, a candidate running without the blessing of the local Democratic ward or township committeemen had an 8.9 percent chance of winning. A slated candidate had a 76 percent chance of winning.

In the handful of suburban subcircuits where Republicans have a chance of winning, a non-slated Republican had a 15 percent chance of winning. Those running with the imprimatur of the

Republican township committeeman had an 86.4 percent chance of winning.

The professors concluded that the voters in most cases have given over their franchise to the ward bosses to choose judges for them.

"Essentially, the slating committee serves as an appointment committee--but with little consideration of judicial qualifications," the report states. "This is ironic, because judicial elections were instituted in Illinois in order to do away with the perceived flaw of an appointive system--placing the selection of judges in the hands of a few select individuals rather than the public."

But the report is not a call to abandon judicial elections, said Malcolm Rich, executive director of the Fund and the Council of Lawyers. Rather, the report offers several recommendations to better inform voters so they can make wiser choices in judicial elections.

The study found that spending an extra $10,000 increased the possibility of getting slated by the Democratic Party organization for a countywide judicial election from 23.6 percent to 31.8 percent. Spending an extra $50,000 increased the probability to 69.8 percent. The study's authors note that candidates who are slated are expected to chip in $15,000 or more to the party for their share of the advertising bill.

"The data reveal a consistent and significant relationship between money and slating," the report concluded. "That relationship may take one of two forms: Fundraising increases the likelihood of being slated, or slating increases the potential for fund-raising."

After political connections and money, other factors, such as having an Irish surname, being female, and having the endorsement of the Chicago Tribune (the Sun-Times generally does not make endorsements in judicial elections) also help to a lesser extent, the study found.

The study found that candidates running in the subcircuits raise more money on average than candidates running countywide.

"Subcircuit elections greatly increased the importance of judicial fundraising and slating by local political organizations, creating a new campaign financing culture that is continuing to expand," the report said.

The silver lining was that candidates without clout had been able to beat the slated candidates in some subcircuits, by working hard, raising money, and getting volunteers to help their cause.

"High quality candidates not slated by the dominant political party have shown that they can raise enough funds to win," the report said. "In other instances, however, poorly qualified slated candidates have beaten out more qualified people who did not have the ability to raise large amounts of campaign funds."

Twenty Cook County judges have gone to prison in as many years for corruption.